CRIMINAL LAW

OBSCENITY

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Nota Bene

This publication includes a preface, prepared by the Prohibited and Regulated Conduct Project, and a study paper written by Professor Richard G. Fox.

PREFACE

The Canadian law on obscenity is in a state of uncertainty. Until 1959, the courts applied the English 1868 *Hicklin* Test which stated that a publication was obscene if " . . . it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character". In 1959, Canada adopted a Criminal Code amendment purporting to add an objective test of obscenity to the *Hicklin* Test which had been criticized for its vagueness and subjectivity. The 1959 test defined obscenity in the following terms:

> " . . . any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene".

But, the interpretation of the new legislation is far from clear. For instance, it is not certain whether the old law of obscenity is still applicable, insofar as some courts have held that the present law of obscenity in Canada consists of the *Hicklin* Test and the 1959 definition, while others consider the *Hicklin* Test to be obsolete and apply the 1959 legislation only.

The meaning of the Criminal Code definition of obscenity is obscure. Although the constituent elements of it are understood, it is not clear how the different elements relate to one another and the test is inconsistently applied in practice. When translated into operational terms, the test of obscenity, as interpreted by Canadian courts, appears to be little more than "does the publication shock the judge?".

The uncertainty of the law of obscenity, the unevenness of its interpretation and application throughout the country, and the question of its relevance as a constituent part of the criminal law to Canadian moral and educational standards, have led the Law Reform Commission of Canada to undertake a stuuy with the view to considering whether the existing law is in need of reform. The Commission has stated, in the presentation of its first program, that, "the law depends upon a broad consensus to achieve an effective ordering of social relations in a democratic society". Obscenity is one of the most controversial legal issues because it is largely dependent on a subjective weighing and ordering of values, both personal and societal, and thus raises the problem of determining a sufficient rationale for state intervention through criminal law or otherwise in a domain in which a variety of strongly felt personal attitudes come into conflict. In publishing the present paper, the Law Reform Commission intends to provide the public with a presentation of the issues involved in the possible reform of the law of obscenity, as it desires to stimulate discussion and debate on what form the law should take. The study paper discusses at length the provisions of the Criminal Code and points out the problems inherent in the judicial definition of obscenity. It also investigates various rationales that have been put forward in support of proposals for reform of this part of the law and discusses, from a legal and criminological point of view, the advantages and disadvantages of possible legal responses that have arisen in other jurisdictions in order to allow a more complete public discussion on the basis of comparative law and takes into account the extensive empirical work recently undertaken by the United States Commission on Obscenity and Pornography.

Claims have been made that adults have a right to voluntarily see and read whatever they desire without government interference; but counter-pressures have been exerted by those who feel that obscenity is connected with a break-down of law and order and constitutes an affront to community standards of tolerance of free expression. One of the great difficulties in the law of obscenity is that of defining the material to be prohibited, but this problem stems from the more substantial difficulty of establishing a commonly accepted and rational justification for the criminal law's involvement in this area in the first instance. The scientific studies conducted at a cost of $2,000,000 by the United States Commission on Obscenity and Pornography represent a major research effort towards acquiring knowledge of the effects of obscenity, yet the studies and their findings have been questioned and subjected to criticism due to alleged incompleteness and bias. In a rapidly changing society, re-examination of the law may not be able to wait upon research that is final and "conclusive". The direction in which available research is pointing must be taken into account together with communal views upon the desirable aims of the law. The study paper on obscenity raises many issues which call for response from an interested public. Among the more important questions are the following.

1) **How is obscenity to be defined?**

Matter charged as being obscene may be found in every form of media. The content of such material entails representations of every aspect of the physical side of human sexuality whether regarded as normal or deviant. Although some people consider pin-up magazines as obscene, generally the word seems to be confined to explicit portrayals of heterosexual and homosexual relations, especially those which are coupled with overtones of cruelty and violence. The worst of obscenity is often described as "pornography", and an attempt is made to prohibit such material as though it existed as a separate, easily identifiable category of obscenity. But the definition of pornography, for legal purposes, raises the same difficulties as does the problem of defining obscenity itself. Is obscenity something which attaches to particular words or certain limited types of activity which can be identified in advance? In other words, are certain things inherently obscene, or is obscenity something which depends upon the circumstances in which the material is disseminated so that the same picture would not be legally obscene in one set of circumstances (e.g. in a medical text book) and obscene in another (e.g. when distributed to children in a school playground)? Should the law treat some things as obscene for all, irrespective of distribution, or should it judge obscenity by reference to the material's impact upon the actual viewers or readers? Should a person selling allegedly obscene material be permitted to answer, as a defence, that the publication in question was not sold or distributed to persons who were affected in any way that is the concern of the criminal law?

2) **What possible effects are the concern of the criminal law?**

A number of possible justifications for legal prohibitions on obscenity have been put forward at various times. Under the *Hicklin* Test the justification was that obscenity gives rise to "libidinous thoughts". If obscene material causes sexual thoughts or arousal, not leading to any criminal activity, should the criminal law attempt to prohibit distribution of such material on the ground that sexual arousal and sexual thoughts are harmful in themselves? (This is quite separate from the argument that arousal may provoke a person into criminal behaviour.) Even if the criminal law should properly attempt to prevent people from having erotic thoughts as a result of reading obscenity, can the law in fact prevent such thoughts, with regard to the magnitude of erotic material presently available in the press, art, literature, entertainment and advertising?

Although some believe the contrary, the available evidence tends to indicate that sexual thoughts evoked by obscene matter are not translated into actions which have criminal consequences. Study of sex offenders, when compared with other types of offenders and non-offenders, indicate that the responsiveness of sex offenders to pornography appeared to be less than other groups. The fact that some offenders are interested in reading "sexy material" does not prove that such reading is the "cause" of their delinquence, and may be merely coincidental. To what extent should law makers take into account community beliefs which apparently do not correspond to the findings of the scientific studies on the effects of obscenity?

Another argument against obscenity is that, in the long run, sexual thoughts stimulated by obscene material will somehow lead to a breaking down, or lowering, of the moral standards of the community. To what extent should the criminal law be concerned with the possibility of delayed and long range effects of exposure to obscenity, rather than with immediate risks of incitement to anti-social conduct? Is it relevant to talk about such material subverting the moral standards of the community? What is the difference between subverting the moral standards and legitimate change? What evidence is there that sexual material is likely to cause the community to disintegrate into social chaos? Is the criminal law and its processes the proper vehicle for attempting to enforce and return to earlier moral standards? Is not this more properly a matter for churches, parents and other moral authorities? Does not Canada provide the scope for the expression for a variety of moral positions which are tolerable provided their expression does not seriously threaten the social existence of other minority or majority groups in the community? Is there not a risk that if the criminal law attempts to enforce moral concepts, religious dogmas, and matters of taste and manners, a serious threat to the civil liberties of all citizens will ensue?

It is sometimes said that making money out of people's interest in or weakness for obscenity is a particularly detestable activity which ought to be punished. To disseminate obscene matter is bad enough, but to do so for financial profit is said to be particularly offensive. Is there something inherently wrong in making profit from the dissemination of sexual material? If there is, what action should be taken against other commercial activity which exploits sex for commercial purposes? Under the existing law the motives of an accused are irrelevant for the purpose of a charge of disseminating obscene material. Should this law be changed? If there is a sufficiently intense and wide spread interest in sex, capable of being commercially exploited, can any criminal law prohibition of commercial exploitation expect to be successful?

It has also been argued that obscenity is prohibited, not because it is dangerously alluring, but because it is grossly offensive. The harm feared is not sexual arousal, anti-social behaviour, low moral standards, or commercial exploitation, but simply that obscene matter is likely to arouse powerful feelings of shock, shame,

disgust and revulsion in those who are exposed to it. Does not the law of obscenity constitute a legal recognition of the existence of deeply entrenched cultural taboos on exposing or depicting intimate details of sexual interaction or excretory activity and of the principle that individuals should not be forced to respond to certain forms of unpleasant stimuli? But if the Canadian community places high value on freedom of expression, how can it, at the same time, prohibit expression on the grounds that it is offensive to some persons? Are there ways in which freedom of expression can be permitted. at the same time minimizing the offense which others suffer? Perhaps a distinction should be drawn between voluntary and involuntary exposure to obscene material? Is it sufficient justification for invoking the criminal law, with its threat of punishment and social stigma, to protect citizens from being shocked and revolted by what they have voluntarily chosen to read or view? Is this not too trivial a ground for invoking the weight of the criminal law? If people willingly seek out offensive material, have they not lost their right to complain if they are offended? Is not the offence to their sensibilities self-limiting — all they have to do is to stop reading or viewing? Is the risk of temporary embarrassment or annoyance, or the thought that other readers may be similarly distressed or misled, sufficient to outweigh the value of free expression? Can the matter be adequately dealt with by requirement that explicit sexual material be labelled "adult sexual material" and that films, if not already given a restricted classification by provincial censorship tribunals, carry a box-office warning (as now is often done) to the effect that parts of the film contain sexually explicit material, and may be offensive to some persons? Is this not more appropriately dealt with under consumer protection, or false advertizing legislation, than as part of the criminal law?

Should the law, as a minimum, protect people from having obscene material thrust upon them in public places, or places of public resort to which they have ordinarily a right of access? When obscene material on public display is being immediately disseminated indiscriminately to passers-by, the offence is direct, immediate, and not capable of being avoided by regulating individual action short of surrendering the right to make use of these places of public resort. In this respect, is not the law of obscenity really part of the law of public nuisance? As such obscenity could be dealt with under the same category as other physical nuisances, public solicitation by prostitutes, begging in the street, and other forms of offensive public nuisance?

3) **Should the audience be considered?**

If obscenity is to be regarded as a quality which inheres in certain identifiable subject matter, it does not matter to whom the publication is distributed; the material always is obscene, and the actual audience to whom the work is distributed is irrelevant. If, however, obscenity is recognized as being circumstantial in nature, the audience must be considered, because an identical publication may be held obscene when distributed to one class of persons, in one set of circumstances, and not obscene when distributed to another class of persons in different circumstances, depending on the impact it has on these respective groups. If there is clear evidence that the allegedly obscene material is being disseminated to a special limited class or group of persons such as doctors, psychologists, lawyers, university students, or consenting adults, it would seem that whether the dissemination of the material was an offence should be decided in the light of the evidence of its effect upon that class or group alone without reference to any incidental peripheral viewers or readers. If this is the case, the law should allow evidence to be admitted for the purpose of identifying the special class of persons among whom the offensive material was distributed, and also for the purpose of informing the court of the likely reaction and possible behaviour of those persons.

How is the problem of indiscriminate dissemination to be dealt with? If the material has been indiscriminately distributed to the public at large, how is its impact to be measured? Should the work be judged by reference to normal or abnormal persons, adults, adolescents or children? Early English legal authority decided that the material indiscriminately disseminated should be measured against its effect on the most susceptible and most vulnerable person in the total group who were exposed to the allegedly offensive publication. Such a preoccupation with those who are most vulnerable meant that normal or average adults could be denied access to material charged as obscene because of a belief that young or abnormal members in the community might be adversely affected. Should the legal test of obscenity be based upon the supposed effect of the work on the lowest level of intellectual and moral discernment in the community? Isn't this bringing levels of taste in moral standards down to the lowest common denominator?

An alternative suggestion is that in cases of indiscriminate dissemination, the obscenity of the publication should be tested by reference to its effect on average members of the community, or a national standard of taste or tolerance. It is realistic to talk about the search for the average person, or a national standard? In the final analysis, does not the court have to blindly guess at the quality and imaginable responses of the average man, or the nature of the national standard?

The study paper on obscenity points out that some writers deny that indiscriminate dissemination of obscenity, in any real sense, ever takes place. The thrust of their argument is that obscene material is not directed

to, and does not reach the general public. It is their belief that the substantial variations in audience appeal which occur in other types of writing or representation, also apply to obscenity. This leads them to conclude that although obscene matter may be publicly offered, in fact it only reaches a limited segment of the general public. It is their view that this limited segment should be the audience against which obscenity is to be tested, and the effect of the publication on others should not be considered. Studies conducted by the United States' Obscenity Commission indicate that it is possible to establish a profile of persons who purchase publicly offered obscene material. If this is so, and the specific audience can be identified, it would follow that obscenity of the publication must be tested by reference to this group alone. If those in this primary audience have voluntarily chosen to read or view the material as in the case of patrons of adult book stores or restricted films, it would appear, logically, that these individuals should be free to pursue their interests in sexually explicit material. If they had to be denied access to this material, on what grounds is the denial of access to be made?

4) **Problems in existing law**

Under existing law private possession (other than possession of prohibited imported obscenity) is not an offence, nor is private non-commercial presentation of obscene material to friends and guests by a person in his own home. If such possession and private showing is not an offence, should not the person desiring to privately view or show the material be legally permitted to obtain such material from a willing seller?

What is the proper role of postal and customs officials in the enforcement of prohibitions on obscenity? And how can the prohibitions sustain against the Bill of Rights declaration regarding freedom of speech and freedom of the press?

It is sometimes proposed that even if a work is obscene, it may be redeemed by possession of certain artistic or scientific qualities which serve the public good, by the author's sincerity of purpose or reputation, or by favourable comparison with other unprosecuted works in open circulation. Should these or new defences be allowed? Under present law, the judges have complained that the defences are vague and ill-defined, and extremely subjective in application.

Under present Canadian law, a work is not obscene if it does not contravene community standards of tolerance. These are national not local standards. The task of establishing, by scientific means, the national standards of sexual tolerance is an extremely difficult and expensive task. It may, indeed, be an impossible task. The alternatives the judges use in the absence of such evidence, is judicial intuitions. Neither situation is particularly satisfactory. Perhaps the setting of a national standard of tolerance is unreasonable?

Accepting obscenity as circumstantial in nature, and assessing the offensiveness of a publication by reference to its impact on the particular audience to which it was disseminated, might seem preferable to an illusory search for a national standard. This would mean, however, that it would be possible for one publication to be held obscene in one part of the country, and not in another, or even to be held obscene and not obscene in different parts of the same city. The distinction between the two rulings would turn, not on the inherent nature of the book, but on the different circumstances in which it was disseminated. Isn't it wiser for the law to be concerned with the prosecution of a particular person and his conduct than a book or magazine in the abstract?

5) **Are any changes required?**

The law of obscenity is regarded by some as the most muddled law in Canada today. There are a number of possible positions to take with respect to the reform of the law. These positions range from those which indicate a basic satisfaction with the status quo, to those which reflect demands either for more stringent laws, or for the total abolition of legal control. Sometimes the demand is simply for increased or decreased efficiency in law enforcement without reference to the state of the law. In what direction should the law move?

Is it enough simply to maintain the law and practice as it is? Since there are few obscenity prosecutions in Canada, and the community at large is not to be greatly concerned with the matter, perhaps the vagueness and uncertainty of the existing law is no more than what is tolerated in other areas of criminal and civil law. If adults do not object to their access to sexual writings being limited, and do not see the law of obscenity as infringing on their rights of freedom of speech and freedom of the press, a case for no change can be made. On the other hand, there may be those who do not wish to maintain the *status quo,* but desire to tidy up the weaknesses and defects in the present law. What tasks should be undertaken in such a tidying up operation? Would it not be helpful for the legislature to state its intention in enacting or maintaining such legislation? Would not such a legislative statement of intention incorporated in the Act be useful, (a) to expose for critical evaluation the hitherto unstated and possibly unwarranted assumptions upon which the legislation has been built, (b) to provide police and prosecutors with some guidance as to the manner in which tney should exercise

their largely unfettered discretions, and, (c) to provide the courts with some identification of the social harm which the legislature is seeking to forestall, as well as an indication of the matter in which the courts should treat offenders.

If continued legislative prohibitions on obscenity are desired, it would seem wise for the criminal law to provide both a more objective definition of the subject matter thought to be obscene, together with a clear legislative statement of the circumstances, if any, which constitute exemptions from liability or affirmative defences. It would also seem helpful, from the point of view of law enforcement, to consider the possibility of introducing a legislative requirement of warnings before prosecution, particularly in the case of commercial distributors.

Should Canada consider the introduction of a special tribunal on indecent or obscene publications? Such a tribunal's sole function might be to determine in a purely non-punitive proceeding whether any book, magazine, or other publication is obscene. Such a tribunal would have no power to punish, but simply to determine the question of obscenity without civil or criminal penalties attached to its determination. Since legal theory and practice are often two separate things and evenness of enforcement is regarded by some as of greater importance than the polishing of definitions, consideration might be given to requiring the consent of the Attorney General before proceedings are brought, or use of some other supervisory technique to reduce inconsistent enforcement practices.

If it is believed that obscenity and pornography are breeding grounds of crime and that official permissiveness is a sign of moral weakness sufficient to jeopardize the very fabric of society, perhaps the only choice is the extension of censorship controls. The obscenity laws could be extended to cover private consensual possession and material depicting extreme violence and other new heads of offensiveness. If extended prohibitions are required, it will be necessary to consider whether the setting up of censorship tribunals or other forms of prior restraint are tolerable in the community, and whether it is consistent with the general principles of the Criminal Code to ease the prosecution burden by placing limitations on type and number of defences, reversing the burden of proof from the crown to the accused and abandoning the requirement of guilty intent or knowledge.

There are two final possibilities. The law could be totally repealed, leaving social regulation and other forms of non-judicial control, or only partially repealed, so as to permit all private consensual transactions between adults while continuing to prohibit other transactions in which there is an element of publicity, absence of consent, or in which juveniles are involved.

Should individuals have a right to possess, read, and view whatever they choose regardless of the apparent lack of objective social value in the material? And if such a right is acknowledged, then does it now also follow that such a right can only be exercised meaningfully with access to some sources of distribution? If the claim to freedom of expression carries with it, as a corollary, a demand for the right to receive and to retain the product of the exercise of free expression by others, what degree of risk should the legislation be prepared to take in the interest of maximizing the value of freedom of speech?

In a pluralistic community, such as Canada, should the criminal law be modified in order to give effect to or reinforce the moral standards of powerful, vocal minorities, or even the majorities? Or should not independent criteria of harmfulness, such as those suggested by the Canadian Committee on Corrections, provide the measure of justification? Is the criminal law, in the 1970's, with overcrowded and overworked court systems and correctional agencies, to continue its role as protector of the morals of consenting adults? In what, if any circumstances, will one willing adult be legally permitted to purchase, from another, access to any sexual material he or she desires?

6) Approach and Preliminary Views of the Project

The members of the Project on Prohibited and Regulated Conduct believe that they should immediately share with the public the research that they have conducted, and indicate to the public the conclusions to which the project is tending on the basis of the work done so far. As the preliminary study indicates, this work has to do essentially with an analysis of present Canadian law on obscenity and with an evaluation of the experiences or research in other countries on this matter.

In short, how certain can we be of the effects of obscenity on society as a whole and on the individuals who make up that society? Normally, this question should be the point of departure for any research directed at a reform of the law on obscenity. In fact, lacking precise information on this matter, how can we justify existing legislation or any proposed replacement? Despite all the effort expended, science has still not succeeded in providing a precise answer to this question. The American Commission on Obscenity and Pornography, whose majority report recommends that obscenity no longer be regarded as an offence, commissioned several empirical studies which were to answer this question. The value of that research and the validity of the conclusions drawn from it are challenged for a great many reasons, notably because of its inadequate

methodology and its subjective character. Needless to say, issue is being taken with the American Commission's recommendations, which are based in large part on the results of that research, and in particular, the charge is made that the signatories of the majority report gave free rein to their preconceptions, relying on the scientific data that was favourable to them. The minority opinion group is accused of dismissing out of hand any scientific data that did not agree with their opinion.

In England, the Longford report, which recommends more stringent legislation on obscenity, does not refer to any scientific research — unless we are willing to accept public opinion polls as scientific research and for this reason, it is criticized for making the question one of opinion only. The American and British experiences have brought out the highly subjective nature of the concept of obscenity and illustrate how strong personal opinions and preconceptions are on the matter. The Project is well aware of this problem. It asked itself the following questions: first, in view of the American Commission's experience, it is worthwhile undertaking empirical research when there is not even a likelihood that it can provide an adequate answer to the question raised? Second, without empirical research, is there not a danger of viewing the question of obscenity strictly from the standpoint of opinions and attitudes? However, insofar as the whole body of research literature in this area allows us to think that such research cannot be conclusive, and insofar as attitudes and preconceptions seem irreconcilable, the Project feels that it would perhaps be better, at least as a point of departure, to study the problem from the standpoint of criminal policy, and evaluate Canadian legislation in terms of its aim and its effectiveness.

In Canada, the purpose of prohibiting obscene matter seems to be to sanction morality. Even though the Criminal Code attempts to give it an objective definition, the judicial interpretation of obscenity revolves about current morality in Canadian society.

A mere reading of the Code and a few other statutes might lead us to believe that obscenity is outlawed in Canada. The actual situation is quite different; we need only walk about in the large Canadian cities to realize the traffic and public display of obscenity and that tolerance of obscenity is practised unequally, if not arbitrarily. Obviously, the subjective nature of the notion of obscenity must be taken into account here; an object or publication that may seem obscene to one person may seem perfectly inoffensive to another, and *vice versa.*

Obscenity within the Canadian social reality seems to result from a host of factors; notably the subjective assessment of what constitutes obscenity, which partly explains police tolerance, and the fact that some people seek after obscene material as they would a commodity to which access is not barred by any legal prohibition. It can therefore be said that the law is not in keeping with social reality. From the judicial standpoint, the problem presents itself as follows: should the law be adapted to the actual situation or, instead, should an attempt be made to change the actual situation to make it conform to the law? Here we run into the problem of the social cost of applying a prohibitive law in a field where large sectors of the population do not want to, or cannot, conform to the standards of the law, or appear indifferent to them.

There is a further problem — that of an operational definition of obscenity which the preliminary study discusses in all its facets. Practically speaking, is it possible to accept the fact that a legal prohibition which is intended to reflect the moral values of society is being habitually, if not systematically, undermined through tolerance in its application, with the result that the law is stripped of its meaning and effect? On the other hand, should account not be taken of the impact that the measures deemed necessary for the effective enforcement of the law would have on society as a whole and on all the values underlying society? Where obscenity is concerned, such measures include advance censorship, strict control at border points, police searches leading to the seizure of suspect products, judicial or quasi-judicial control of art, aesthetics, literature and so forth.

In the field of criminal policy, the project group subscribes to the basic principles and purposes of criminal justice as expressed by the Canadian Committee on Corrections:

> "The basic purpose of criminal justice is to protect all members of society, including the offender himself, from seriously harmful and dangerous conduct . . . The basic purposes of the criminal law should be carried out with no more interference with the freedom of individuals than is necessary . . . No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means".

These principles presuppose that no act should be criminally proscribed unless "its incidence, actual or potential, is substantially damaging to society" and that "no law should give rise to social or personal damage greater than that it was designed to prevent." These principles also imply that certain acts should be accepted as falling mainly in the area of private morality, and that they should not be prohibited by law unless they are harmful to society and to the people who make up society. The following principles apply only to obscenity in the form of pornography.

The Project believes that the prohibition of obscene matter should be maintained and applied strictly where children are concerned. The Criminal Code should prohibit any adult from communicating to a child or

adolescent "sexually explicit material", except in the normal course of an approved education program. This offence should apply to any adult except the child's parents or guardians.

The Project believes that the flood of advertising and public display of sexual material should be eliminated so that persons who have no interest in such material and who do not want access to it will be protected from the nuisance that it represents.

Films might be rated — and not prohibited — according to the extent to which they deal explicitly with sex, in order to determine whether children and adolescents can be admitted to them, and to enable the public to make an informed choice of entertainment.

Because radio and television reach a general audience, the present power of the Canadian Radio-Television Commission to regulate program content seems acceptable to us.

However, the project group believes that where adults are concerned, the possession, sale and distribution of "sexually explicit material" should no longer be penalized. Adults should be free to determine their own conduct in this regard. However, the removal of possession, sale and distribution of obscene material from the criminal law should be accompanied by regulation aimed at suppressing the public offence and nuisance that advertising and display of obscene matter may provoke.

In the development of a criminal policy concerning all the legislation on obscenity, the Project will also have to take into account the separate problem raised by the exploitation of violence, and it will also have to deal with the problem of regional variations.

Needless to say, the foregoing should not be construed as a definitive stance, or even a firm proposal for the reform of the law on obscenity. It should be regarded only as the direction in which the Project is leaning; we thought that it was better to express frankly the opinion we have formed so far on the basis of the research that the Project has conducted in order to stimulate discussion around concrete proposals. The Project invites individuals, associations and groups to make their views known.

Prohibited and Regulated
Conduct Project

Study Paper on OBSCENITY

Prepared for the Law Reform Commission of Canada

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June 1972

NOTICE

Frequent reference is made to the work of the United States *Commission on Obscenity and Pornography*. This Commission reported in 1970 after two years work at a cost of $2 million. Though the 442 page majority report and the 257 pages of dissent and separate statements reflect a wide range of disparate views, the work is invaluable for its coverage both of the legal aspects of the topic and of the extensive empirical work undertaken under the auspices of the Commission. The report and its accompanying eight volumes of technical data are published by the U.S. Printing Office. However, in this paper, all citations of the Commission's work are based on the more easily accessible Bantam Book paperback printing of the final report.

TABLE OF CONTENTS

NOTICE 11

INTRODUCTION 15

THE SUBJECT MATTER: MEDIA, CONTENT AND CLASSIFICATION 18

INHERENT OR CIRCUMSTANTIAL OBSCENITY? 23

THE HARM FEARED 26

1. Sexual Arousal 26
2. Overt Misbehaviour 27
3. Change In Moral Standards 30
4. Commercial Exploitation 33
5. Offensiveness 33
6. The Audience To Be Considered 35

CRIMINAL CODE PROVISIONS 40

1. Is The Hicklin Test Still Applicable? 42
2. What Is The Meaning of the s.159(8) Test? 42
3. Knowledge and Intention 44
4. Relationship Between s.159 and s.160 45
5. Conspiracy 46
6. Private Possession 46

OTHER FEDERAL LEGISLATION 49

1. Postal 49
2. Customs 49
3. Radio and Television 50
4. Trade Marks Act 50
5. Bill of Rights 50
6. Relationship Between Federal and Provincial Legislation 51

DEFENCES 53

1. Public Good 53
2. Author's Purpose 54
3. Literary or Artistic Merit 54
4. Comparison With Other Books 54
5. Why Special Defences? 55

EXPERT EVIDENCE 57

ARGUMENTS FOR CHANGE AND LEGISLATIVE ALTERNATIVES 59

1. Preserving The Status Quo 59
2. Clarification and Re-Definition of Existing Law 59
3. Extended Prohibitions 63
4. Total or Partial Repeal 63

CONCLUDING REMARKS 68

SELECT BIBLIOGRAPHY 71

APPENDIX A: Canada Post Office Department Policies 75

APPENDIX B: Canada Customs Policies 77

APPENDIX C: Obscenity Charges and Seizures in Canada 79

INTRODUCTION

> "It is social censure and public opinion that we normally look to to regulate the evolution of private *mores* and if, instead, we insist that this continuing process be translated and crystallized into penal law, we have only ourselves to blame when judges and Parliamentary draughtsmen fail to convert an inescapably subjective word like obscene, whose interpretation varies not only from person to person but from year to year, into an acceptably objective law capable of reasonably consistent application. That they can only offer us question-begging periphrasis should be no surprise because we have left them without guidance as to what is intended to be achieved. They cannot say what they mean because they do not know what they mean, and they do not know what they mean because we cannot tell them what we mean them to mean."
>
> Arts Council of Great Britain, *The Obscenity Laws*, London, 1969, 14-15.

What is meant by obscene? The derivation of the word is obscure and in its modern usage, it is associated with a host of synonyms: dirty, disgusting, filthy, immoral, impure, indecent, lascivious, lewd, licentious, lustful, offensive, pornographic, prurient, smutty, vulgar. Some courts have attempted to separate indecency from obscenity in holding that "indecent" is a weaker label of disapprobation: an indecent article being not necessarily obscene, but an obscene one always being indecent.[1] In similar fashion pornography is regarded as representing the worst in obscenity and denoting total rejection. Works condemned as pornographic have been described as "utterly without redeeming social importance",[2] "pure filth",[3] and as "dirt for dirt's sake".[4] But such exercises in semantics provide no clue as to the external criteria by which indecency may be distinguished from obscenity, obscenity from pornography, nor pornography from its host of accompanying adjectives. Different writers have variously asserted that the "essence" of obscenity is to be found in the subversion of accepted standards of sexual morality,[5] in invitation or excitation to venereal pleasure,[6] in individual or communal feelings of indignation,[7] in the "leer of the sensualist",[8] or in the community's sense of shame at exposure of sexual or excremental matters.[9] Anthropologists, however, assert that they can discover no absolutes in the descriptive content of what is regarded as obscene in different societies in the world.[10] Nothing is obscene that has not been culturally defined as such. In each society obscenity inheres in representations, words or acts which may not necessarily be prohibited elsewhere.

Obscenity is a term which enjoys current use in both legal and non-legal contexts. If it is to be maintained as a criminal law concept, it ought to be susceptible of reasonably precise definition in its judicial uses if for no other reason than to satisfy the principle of legality — *nullum crimen sine lege, nulla poena sine lege* — that the citizen be able to ascertain beforehand whether his conduct will infringe a legal prohibition. The common law could offer nothing more precise than the *Hicklin* test:

> ". . . whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall".[11]

Nothing is offered to show what is meant by depravity and corruption and proof of harm is not required since:

> "It is assumed incontrovertibly by the common law that obscene writings do deprave and corrupt morals by causing dirty-mindedness, by creating and pandering to a taste for the obscene".[12]

In Canada, the common law test of obscenity has been modified by statutory provisions in the *Criminal Code:*

> "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence shall be deemed to be obscene".[13]

Judicial interpretive glosses upon this provision have provided a morass of verbiage whose practical affect is to make the subjective personal reaction of the individual members of the court the overriding factor in the judicial evaluation of obscenity.

There is no tangible or verifiable reality corresponding to the label "obscenity". It is an expression of opinion rather than of fact. It is a value judgement based upon the emotive responses of individuals or groups to stimulation by exposure to tabooed material. The emotions expressed are usually those of disgust, anger and indignation, but the elicitation of these responses is always relative, subjective and variable. Though occupational, educational and income factors have been shown to have significant bearing upon an individual's judgement that material is obscene, it has also been demonstrated that, even among different individuals, certain items and specific characteristics of items will elicit fairly consistent judgements regarding the degree of obscenity present.[14] In popular usage the word obscenity may be applied, as a pejorative term, to indicate disgust with almost any subject matter. Until recently, in legal usage, obscenity was exclusively confined to breaches of taboos relating to sexual and excretory functions.[15] But now that by statute the concept has been extended to include undue exploitation by sex of crime, horror, cruelty and violence it appears that a much wider range of material may be condemned under this head.

Not only is obscenity an inescapably subjective phenomenon, it also represents a depreciatory judgement on at least three different grounds: aesthetic, moral, and utilitarian. The first two call for *de gustibus* definitions which cannot provide an objective standard for differentiating meritorious from meretricious publications. The aesthetic judgement is made in relation to the technique of presenting the tabooed subject matter. Havelock Ellis suggested that we choose to label as obscene that which depicts shameful matters which ought not be shown on "the stage of life".[16] But the issue is not quite as straightforward as this, because if the shameful matters are presented with sufficient literary or artistic merit the work may be saved — presumably on the ground that it is no longer aesthetically repulsive (though still shameful). D.H. Lawrence, who believed quite firmly in the need for censorship of some forms of sexually explicit material, distinguished non-censorable eroticism from censorable pornography on aesthetic grounds alone. Pornography in general, he claimed, could be recognized by the insult it offered to sex and the human spirit, while pornographic writings in particular were, " . . . either so ugly that they make you ill, or so fatuous you can't imagine anybody but a cretin or a moron reading them, or writing them."[17]

To some obscenity is, at bottom, not an aesthetic category but a sin. It is suppressed for the spiritual purity and moral tone of the community and the salvation of its members.[18] The sinfulness of obscene publications is demonstrated by reference to the fact that such works depict "poly-morphous perverse" sexual behaviours condemned by Christian belief. Obscenity laws are thus seen as manifestations of a community's aspirations to holiness or propriety and, accordingly, whether a particular publication threatens these aspirations becomes a purely moral judgement. Whether criminal sanctions may be imposed upon citizens for breach of common standards of morality alone, without further utilitarian justification, has been the subject of the well known Hart/Devlin debates and it is sufficient for this study paper to note that, to some minds, the prosecution of obscenity is simply the legal enforcement of one part of the seamless web of community morality and that the enforcement of community morality is, in itself, a positive moral value which requires no further vindication. However, others hold that only those aspects of community morality essential for social survival should be enforced by the sanctions of the criminal law.

Finally, representations of sexual or excretory functions will evoke damnatory connotations if it is believed that they will, directly or indirectly, threaten the stability of the community or its members. But the exact nature of the threat is a matter of endless debate. Overt misbehavious of a criminal nature would, of course, represent a threat to society and sufficient utilitarian justification for the prohibition of the writing which incited it. But other threats are perceived and the utilitarian judgement that obscenity does or does not tend to produce harmful behaviour appears to be predicated upon intuition rather than evidence. And, often, the intuition itself is derived from the feelings of shock, disgust and revulsion generated by the offending representation.

In its attempt to control obscenity the law is acutely hampered by its own indeterminacy of aim. The recent reports of the United States Commission on Obscenity and the Working Party of the Arts Council of Great Britain, the experiences with liberalized laws of the Scandinavian countries, especially Denmark, and recent concern for the strengthening of civil rights including the right of adult, non-captive audiences to see and read whatever they wish without government interference so long as no criminal conduct results, have generated demands for modification of the law relating to obscenity. But there are also counter pressures from those who are concerned that obscenity is connected with a breakdown in law and order and constitutes a grievous affront to community standards of tolerance of sexual expression.

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13. R.S.C. 1970, c. C-34, s.159(8), formerly s.150(8).
14. Higgins & Katzman, "Determinants in the Judgement of Obscenity", (1969) 125 *American Journal of Psychiatry* 1733.
15. English & English, *Dictionary of Psychological and Psychoanalytical Terms*, New York, 1958, 353, restricts the definition of obscenity to "gestures, language or pictures that violate the established conventions of what may properly be expressed under certain conditions in respect of sex and the excretory functions." The American Law Institute's *Model Penal Code* (Proposed Official Draft), 1962, limits obscenity to " . . . a shameful or morbid interest in nudity, sex or excretion. . . . ": s.251.4.
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THE SUBJECT MATTER: Media, Content and Classification

"What's your game?" she asked suddenly.
"My game? Oh, I write."
"Go on . . . do you mean it ? What sort of stuff? History, biology . . . ?"
"Naughty books," I said, trying to blush deeply.
"What kind of naughty books? Naughty-naughty, or just dirt?"
"Just dirt, I guess."
"You mean – Lady Chatterby or Chattersley, or whatever the hell it is? Not that swill you don't mean do you?"
I laughed. "No, not that sort . . . just straight obscenity. You know . . . duck, chit, kiss, trick, punt. . . . "

Henry Miller, "Astrological Fricassee", in *Remember to Remember: Essays and Stories*, London, Grey Wall Press, 1952.

Despite the English decision of *John Calder (Publications) Ltd.* v. *Powell* [1] in which a book advocating drug addiction was declared obscene as tending to deprave and corrupt its readers, the legal prohibitions on obscenity are applied as a matter of practice only to sexual or scatological material especially that featuring graphic representation of human genital organs and their functions. Section 159(8) of the *Criminal Code* deems obscene any publication a dominant characteristic of which is the undue exploitation of sex, or the combination of sex and crime, horror, cruelty or violence. The matter charged as obscenity may be written, printed, drawn, photographed,[2] filmed, modelled, or recorded.[3] The descriptive content of the material comprises representations of every aspect of the physical side of human sexuality, whether regarded as normal or deviant. It includes portrayals of men, women, adults and juveniles, engaged in every immaginable form and combination of heterosexual and homosexual relations and embraces, oral-genital, genital-anal and masturbatory activities, fetishes, necrophilia, incest, relations with animals and sexual gratification in defecation and urination. The presentation of these activities is often coupled with sado-masochistic overtones, especially those derived from linking sex with flagellation and torture.[4] The more graphic the representation and the more taboo the language in which the descriptions are couched, the more likely is the publication to be regarded as obscene.

Sexually explicit material can be communicated in all media forms. Well publicized general release films produced by major studios have given increasingly candid treatment of sexual subjects both in the theme, activity depicted and degree of nudity shown on the screen. Full frontal nudity and simulated acts of masturbation, fellatio, cunnilingus, sexual intercourse, and the entire gamut of "dirty language" may be encountered. These activities may also be accompanied by graphically portrayed scenes of violence. Other films, often known as "skin flicks", are shown in a more limited circuit of theatres. The film titles, though advertised, are publicized less and are not as familiar to most people as the general release films. The main feature of these films appears to be nudity, sexual exploitation, and minimal story line. Recently the larger Canadian cities have seen the introduction of small theatres exhibiting silent black & white or colour 8 mm. films of females stripping and parading themselves in the fashion of a burlesque show. Some "adult" book stores also have a collection, of juke-box like machines or "peep-shows" which, for 25¢, show approximately 2-3 minutes of an erotic 8 mm. film. To view the entire reel the customer must spend between $1 and $2. Films in these "movie-parlours" usually depict totally nude males or females exposing their genitals and may depict both heterosexual and homosexual foreplay between couples, depending on the current level of police enforcement in the area. Some theatres offer sexually oriented films to their audiences on television screens in order to avoid the restrictions liable to be imposed under provincial film censorship laws.

The predominant media for sexual content is, of course, printed matter — hard-cover books, paperbacks, periodicals, and magazines. These include hard cover best selling book-club selections with a strong sexual theme, their paperback versions, confession and scandal magazines and newspapers, glamour and pin-up periodicals (some of which contain sophisticated literary and political writing), "adult only"[5] paperback books, nudist magazines, and other pictorial matter. It is not possible to elaborate the innumerable variations in content and form of this sexually oriented material. However, it appears to be a common feature

of the "adults only" paperpack books that all restraints upon both language and description of sexual activity are eliminated. The books consist of a series of sexual adventures linked by a minimal plot. "Four-letter" words describing sexual acts, genitalia, excretion, etc. proliferate and the books tend to have a major theme such as heterosexual intercourse, lesbianism, anal intercourse, bestiality, sadism and masochism, or homosexuality. There is another category of paperback books which purport to be serious histories or scientific studies of sexual activity. Although these books are presented as having been written by medical practitioners or research scientists, they consist primarily of detailed descriptions of sexual performances and are sold alongside what purport to be marriage manuals, and studies of censorship and pornography. These "adults only" paperbacks retail in Canada at between $2 and $5. The price tag often is superimposed over an United States price which is usually considerably less.

"Adults only" pictorial magazines contain photographs, (nowadays usually in colour) of nude males, females or groups posed in a manner which emphasizes their genitals, sometimes in clinical detail. In the industry the latter are known as "spreader" or "split beaver" magazines. They contain little text or enough to represent the magazine as one advocating nudism. The magazines generally imply but do not actually portray sexual activity and arousal of the male models is seldom depicted. The magazines approximate 32 pages or more in length and sell in Canada at about $5. They are usually sealed in clear plastic envelopes and clearly marked "adults". In some cases genital nudity is visible on the front or back cover, but ordinarily the magazine is packaged so as to cover these areas of the model's body. There is a second-hand market in both the "adults only" paperback books and pictorial magazines. In addition to the material described above, most of which is available without difficulty in any of the larger Canadian cities, there is a covert market in more explicit material. This is material which is distributed in an apparent belief that it is unlawful either because it has been illegally imported or exceeds the boundaries of permissible explicitness tolerated on the open market. At some stage during the last few years most "adult only" paperback books, pictorial magazines, and erotic "classics" were sold in this manner. There is no well defined standard regarding that which may be sold openly and that which must circulate covertly. Police enforcement practices are obviously a relevant factor. By and large, however, colour-moving films, photo-sets, and pictorial magazines depicting vaginal, oral or anal penetration, masturbation and sexual relations with animals (or combinations thereof) are usually the subject of "under the counter" distribution. Covert distribution may take place either through established retail outlets for books in other settings such as bars or pool-rooms, and by mail-order or private illegal importation from U.S.A. or Europe.

One of the difficulties with the epithet "obscene" is that for some it encompasses popular erotica such as the glamour or pin-up magazine, while for others it is confined to written or photographed portrayals of bizarre sexual or scatological behaviour. Attempts have been made to identify and categorize different classes of material subsumed under the head "obscenity". Some focus on format, other on content. Commissioners Hill, Link and Keating in their minority addition to the Report of the Commission on Obscenity and Pornography[6] emphasised the former when they identified the following categories of publication as deserving of special review by prosecuting officials:

> "1. The Stag Film; 2. The Sexploitation Film; 3. The Commercial Unrated Film; 4. Advertisements for X and Unrated Films; 5. Underground Sex Publications; 6. Underground Newspapers; 7. Mimeographed Underground Newspapers; 8. Sensational Tabloids; 9. Homosexual Magazines; 10. Sex Violence Magazines; 11. "Spreader" or "Tunnel" Magazines; 12. Teenage Sex Magazines; 13. Pseudo-Scientific Sex Publications; 14. So-called Nudist Magazines; 15. Lyrics on Commercially Distributed Rock Records; 16. Sex-action Photographs; 17. Sex-action Records; 18. Sex-action Slide and Tapes; 19. Mail Order Advertisements for the above; 20. Paperbacks with themes of: homosexuality, sado-masochism, incest, bestiality; 21. Hard Cover Books devoted to homosexuality, sado-masochism, incest."[7]

Such classifications, however, do not identify sexual material in sufficiently distinct forms to warrant their use as a basis for differentiating licit from illicit publications.

Courts and writers have sometimes attempted to set the boundary of acceptance at "pornography".[8] Of all the pejorative epithets applied to sexual writings, the term "pornography" implies the severest condemnation. It has been asserted that publications condemned as pornographic may all be shown to exhibit definite similarities in structure and content which are sufficient to distinguish them from other types of obscene writing. Gebhard and his colleagues in their Kinsey Institute study of sex offenders[9] defined erotica as covering all graphic, literary and auditory materials that induce, at least occasionally, some degree of conscious sexual response in most adults, but they identified pornography as a specific sub-class of materials deliberately designed to produce strong sexual arousal rather than titillation and which usually achieves its primary goal.[10]

While indulgence in pornography has been called a form of psychic masturbation,[11] it is more likely that the most frequent use made of such material is to provide erotic fantasy for actual physical masturbation. Indeed the hallmark of pornography might be taken to be its success in stimulating the viewer or reader (usually male) to orgasm. Anthropologist Margaret Mead sees pornography as "words or acts or representations that are calculated to stimulate sex feelings independent of the presence of another loved and chosen human being."[12] According to her, an essential element in pornography is that it has the character of the day-dream as distinct from reality:

> "True, the adolescent may take a description of a real event and turn it into a day-dream. The vendor of pornography may represent a medical book as full of day-dream material, but the material of true pornography is compounded of day dreams themselves, composed without regard for any given reader or looker, to stimulate and titillate. It bears the signature of non-participation . . . pornography does not lead to laughter; it leads to deadly serious pursuit of sexual satisfaction divorced from personality and from every other meaning. . . . "[13]

On a more pragmatic level, Eliasberg sought to provide objective criteria for pornography in the form of a table of clinical factors. The presence of "several" of these factors would allow the diagnosis of pornography, *viz*:

> "1. Asexual sexuality (the sexuality is indefinite as to the sex of addressee and sender).
> 2. Emphasis on the erogenic zones of the body.
> 3. Monotony and infantilism in the emotions.
> 4. Emphasis on parts rather than the whole.
> 5. Stereo-typed repetition.
> 6. Adjectives and attributes without substance.
> 7. Sequence of cruelties and suffering (physical and moral).
> 8. Absence of true narrative (plot), let alone dramatic progress.
> 9. Absence of contact between the personalities of the onlooker, reader, or listener on the one hand, and the writer, artist, composer on the other; often artistic worthlessness as stated by art criticism."[14]

The generality of these particular cirteria and each of the preceeding definitions of pornography render them all but useless as an aid in the formulation of legal policy.

In a widely publicized book, *Pornography and the Law,*[15] two American psychologists, Drs. Eberhard and Phyllis Kronhausen, claim to have discerned a number of criteria by which pornography can be distinguished from erotic realism and other forms of erotica considered to be obscene. They state that the primary purpose of pornographic books is to stimulate erotic responses in the reader rather than to describe truthfully the basic realities of life and that the predominant feature in the organization of such books is the progressive development of erotic tension during the course of the story. On their analysis, pornographic books commence with a relatively mild low-keyed sexual encounter and proceed with a flimsy tale whose only function is to serve as a vehicle for tying together a succession of sexual incidents. These increase in frequency, complexity and erotic intensity as the story unravels until ultimately the work reaches a climatic end in a concentration of orgiastic scenes. The sexual incidents are always described in a direct and obtrusive manner. The plot is rarely hampered with more than a minimum of distracting non-erotic content. Neither philosophical discourse, characterization nor scene setting is allowed to interfere unduly with the aphrodisiac stimulus.

According to the Kronhausens, the content of pornographic writing which sets it apart from other erotic works is the elaborate and exaggerated description of seduction, defloration, incest, permissive-seductive parent figures, profaning the sacred, super-sexed males, nymphomaniac females, negroes and asians as sex symbols, homosexuality, flagellation and torture. The writing rarely pretends to be a contribution to science, literature or aesthetics and because popular literature has rendered respectable clinical descriptions of heterosexual foreplay and coitus, all that is left for pornographers are descriptions of the activities of various sets of genitals, "dirty language" and a series of sexual taboos to be exploited. Since there is a limit to the range and variety of sexual activity of which humans are capable, the pornographers' writing is necessarily repetitious, using the same taboo expressions of speech and calling up the same sexual images. If it were not for its aphrodisiac effect, pornography would be dismissed as tediously boring.[16]

The Kronhausens distinguish pornography from erotic realism which they claim does not posess the characteristics of pornography but which nevertheless is considered to be obscene. If pornography is "sex out of all contexts except that of sensational enjoyment"[17] then erotic realism is sex in the context of reality. They argue that the dominant characteristic of erotic realism is that it presents a truthful description of man's sexual behaviour.[18] And if an author writes realistically on the subject of sex it is not inappropriate for the reader to respond erotically to the writing, in the same way as he may laugh at humorous passages. Realistic

writing about sex need not always stimulate erotic responses, it may often have decidedly anti-erotic effects, but both the erotic or anti-erotic reaction are incidental to the author's primary aim, that of depicting life as it is, including the sexual side of man's personality. This is in direct contrast to pornography, in which reality is distorted in order to promote erotic responses.

Underlying the differentiation of erotic realism as a special class of writing is the argument that the expression of frank sexuality is entitled to a proportional share in any attempt of graphic representation of the reality of human existence, irrespective of the technique or medium used. The Kronhausens extend this argument further, by contending that erotic realism reflects a basically healthy and therapeutic attitude towards life in that it emphasizes man's corporeality and contributes towards familiarity with one's body and an acceptance to its natural function, both of which they regard as necessary prerequisites of mental health.

On closer analysis the Kronhausen's distinction between pornography and erotic realism breaks down.[19] Firstly, it fails because books which attempt to represent the reality of human sexual relationships can often lay claim to literary, artistic or scientific merit and this renders them more tolerable than those which cannot be justified on these grounds. It is the aesthetic or scientific justification rather than any significant differences in aim, structure or content that distinguishes that which is tolerable (erotic realism) from that which is not (pornography). Secondly, it does not assist in segregating into pornographic and non-pornographic categories material which, although designed primarily to stimulate "auto-erotic reverie",[20] fails to deviate significantly from the reality of sexual relations. The bulk of this material is non-literary erotica, especially filmed or photographed scenes of heterosexual and homosexual intercourse, oral stimulation of genitals and bestiality. Because they are portrayals of reality, they can hardly be excluded from the category of erotic realism yet the current practice is to regard them as hard-core pornography.

Another possible way of distinguishing censorable obscenity from non-censorable erotica is to identify those specific parts of the human body the exhibition of which is obscene. Pictorial representations of nude human figures not engaged in any sexual activity pose the typical problem. When, if ever, does a photograph of a nude human body, or its parts, become obscene? It seems that the courts do not consider that nakedness itself is obscene unless pubic areas or genitalia are clearly revealed.[21] Yet there is common acceptance of genital nudity in children and a high degree of nudity in an attractive female is the essence of the pin-up girl. The courts have rarely attempted to formulate the criteria which distinguishes acceptable from non-acceptable genital exposure and on the odd occasion when such an attempt has been made, the tribunal has been forced to adopt quite arbitrary designations of obscenity. Thus in the United States case of *Sunshine Book Company* v. *Summerfield*[22] the presiding judge, in considering whether a nudist magazine was obscene, proposed the following rules for the assistance of postal authorities:

> "Posterior views of nudes of either sex and of any age are not obscene.
> Side views of nudes are not obscene if they do not reveal the genitalia or pubic areas.
> Front views of nude adults if photographed at sufficient distance are not obscene nor are they obscene if the pubic area is concealed or obliterated by retouching or shadowing the photograph.
> Front views of nude children below the age of seven years which show diminutive and underdeveloped genitalia are not obscene.
> Front views of nude children between the ages of seven and fourteen years may or may not be obscene depending on an assessment of each individual photograph.
> Close range views of the pubic areas of adults are obscene."[23]

At one stage it was common for police forces and courts to adopt the rather crude but expedient approach of treating as obscene any portrayal of nudity in which pubic hairs were shown, irrespective of the subject's pose.[24] But this is now neither the practice nor the rule.[25] And attempts to specify in legislation the precise areas of the human body which are obscene begin themselves to have somewhat of an aura of indecency *viz*:

> "The following material is 'obscene for minors' . . .
> Any picture or other representation which depicts one or more 'specified anatomical areas' . . .
> 'Specified anatomical areas' means:
> (i) less than completely and opaquely covered; (a) human genitals, (b) pubic region, (c) buttocks and (d) female breast below a point immediately above the top of the areola; and
> (ii) human male genitals in a discernably turgid state even if completely and opaquely covered."[26]

Because the distinction between obscenity and acceptable titillation in nudity is so subjective, it is not possible to obtain a precise description of what is considered obscene in the naked human being. The sit-

uation arises out of the community's own ambivalent attitude towards genital nudity and in the paradox that in its very insistence that sexual organs and activities be hidden, the community manifests its intense interest in them.

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1. [1965] 2 W.L.R. 138. See also commentary in [1965] *Criminal Law Review* 112. The decision in *R.* v. *Lambert* (1965) 46 C.R. 12, 15 suggests that a similar interpretation of obscenity is possible in Canada.
2. Photographic negatives are included: *Cox* v. *Stinton* [1951] 2 All E.R. 637 cf. *Staker* v. *D.P.P.* [1963] 1 Q.B. 926. In England now see *Obscene Publications Act* 1964, s.2.
3. *Criminal Code* s.159(i)(a) & (2)(a).
4. See Kilpatrick, *The Smut Peddlars*, London, 1961, ch. 1.
5. So called because they usually bear an "Adult Only" label on the cover.
6. *Report of the Commission on Obscenity and Pornography* (Bantam Books edition), New York, 1970, 456.
7. *Ibid.*, 503.
8. *E.g. R.* v. *Adams* [1966] 4 C.C.C. 42, 75-76 (N.S.Co.Ct.); *R.* v. *Georgia Straight Publishing Ltd. & McLeod* (1970) 5 C.C.C. 31, 41 (B.C. Co.Ct.) but cf. *R.* v. *Dominion News & Gifts Ltd.* [1963] 2 C.C.C. 103, 121 (Man.C.A.).
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10. *Ibid.*, 669. Or, to put it in crude terms: Pornography is "any passage of text, or any picture, that gives seven of twelve good men and true an erection. . . . ."; quoted by Hawkins in "The Problem of Pornography", (1966) 5 *Sydney Law Review*, 221, 222.
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13. *Ibid.*, 19 & 23.
14. Eliasberg, "Psychiatric Viewpoint on Indecency, Obscenity and Pornography in Literature and the Arts", (1962) 16 *American Journal of Psychotherapy* 477.
15. Kronhausen & Kronhausen, *Pornography and the Law* (revised edition), New York, 1964.
16. *Commission on Obscenity and Pornography*, 214-218 for discussion of satiation effect. See also discussion below under heading The Harm Feared – Sexual Arousal.
17. Soper in *Does Pornography Matter?* (Rolph, ed.), London, 1961, 42.
18. Into the category of erotic realism the Kronhausens place the *Kuma Sutra* and the *Perfumed Garden,* Mark Twain's bawdy essay 1601, the unexpurgated version of the Diary of Samuel Pepys, the *Memoires* of Casanova, *My Secret Life* (11 volume record of the sexual exploits of an anonymous Englishman who lived in London during the Victorian era), *My Life and Loves* by Frank Harris, Nabokov's *Lolita*, the Works of Henry Miller, D.H. Lawrence's *Lady Chatterley's Lover* and, with some reservations, John Cleland's *Fanny Hill: Pornography and the Law*, 303-304.
19. See criticism in Hawkins "The Problem of Pornography", (1966) 5 *Sydney Law Review* 221, 224-226; Katz, "Free Discussion V. Final Decision: Moral and Artistic Controversy and the Tropic of Cancer Trials", (1969) 79 *Yale Law Journal* 209, 222, n. 43, and Clor, *Obscenity and Public Morality*, Chicago, 1969, 215-220. It has been reported that the head of Citizens for Decent Literature has condemned the book as undercover pornography: Rogers, "Police Control of Obscent Literature", (1966) 57 *Journal of Criminal Law Criminology and Police Science* 430, 460.
20. Larrabee, "The Cultural Context of Sex Censorship", (1955) 20 *Law and Contemporary Porblems* 672, 684.
21. *M'Gowan* v. *Langmuir* [1931] S.C. (J.) 10, 14; *R.* v. *Great West News Ltd. Mantell & Mitchell* [1970] 4 C.C.C. 307 (Man.C.A.). Cf. *Conway* v. *R* (1943) 81 C.C.C. 189 (Que.K.B.) and *R.* v. *Stroll* (1951) 100 C.C.C. 171 (Mont.Sess.Ct.)
22. (1955) 128 F.Supp. 564. The photographs which the court held to be obscene in this case are reproduced in Gerber, *Sex, Pornography and Justice,* New York, 1965, 143-147.
23. (1955) 128 F.Supp. 564, 570.
24. *Minutes of Evidence Before the Select Committee on the Obscene Publication Bill,* London, H.M.S.O., 1958, 59-60 & 73; Fox, *The Concept of Obscenity,* Melbourne, 1967, 29.
25. See English magistrate courts decisions referred to in Arts Council of Great Britain, *The Obscenity Laws*, London, 1969, 88.
26. *Commission on Obscenity and Pornography,* Minority Report by Commissioners Hill, Link, and Keating, Appendix I, 576.

INHERENT OR CIRCUMSTANTIAL OBSCENITY?

> "In my opinion, the use to which various materials are put — not just the words and pictures themselves — must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances, but at the same time, 'obscene' in the extreme when sold or displayed to children."
>
> *Jacobellis* v. *Ohio* (1964)
> 378 U.S. 184 at 201 (U.S.S.C.)
> per Chief Justice Warren.

The attempt to identify and set apart pornography as a distinct category of interdicted erotica draws attention to the fact that there are two major conceptions of the nature of obscene material. If the law maker thinks of obscenity as an intrinsic quality of certain subject matter which is always to be considered obscene irrespective of the context in which it appears, or the audience to whom it is directed, the implications for legislation will be entirely different from those which follow if obscenity is regarded as a variable quality whose existence depends upon the circumstances of dissemination.

It is in the proposition that material which suffers execration as the worst in obscenity exists, in pornography, as a distinct type of writing with a recognizable structure and content, that the most forceful argument for inherent obscenity is to be found. The stronger the feelings of disgust, anger, indignation and arousal/revulsion, generated by a publication, the more difficult it becomes to conceive of a situation in which the work is not properly labelled obscene. This is the basis of the concept of inherent obscenity and from it flows the contention that within the general community, some matters are considered obscene in whatever context they appear. For instance, the words "fuck" and "cunt" are popularly regarded as obscene no matter where they are found and these words do not lose their character as obscenities, merely because of the circumstances of their publication or the audience to whom they are addressed. In *R.* v. *K & H*[1] counsel for the defence, in a Canadian case involving a charge of gross indecency, argued that acts such as urination were not indecent *per se* but took their character from the surrounding circumstances *e.g.* whether the act could be observed by passers-by. The trial judge responded by saying:

> "The weakness of [t]his argument and of this illustration, in my view, lies in the fact that the act of urination is not in itself indecent at all. Here the act does become indecent because of the time, place or circumstances of its performance, but when we come to an act which is inherently indecent, the circumstances surrounding its performance are immaterial . . . . I cannot believe that buggery, or acts akin thereto, can ever be anything but grossly indecent, whatever the circumstances under which they are performed."[2]

On the other hand a magistrate, in the same jurisdiction, had only a few months earlier held that an act of fellatio between a sixteen year old girl and her fiance in a station-wagon in a park at night was not indecent having regard to the circumstances in which it was performed.[3] In the absence of empirical study, it is not possible, however, to indicate the precise range of subject matter that is generally regarded as obscene in all circumstances. Vague general labels such as "pornography" do not provide the answer, nor would such information, if available, resolve the question whether individuals should be free to obtain such material for their own personal gratification.

If obscenity is not regarded as an invariable characteristic of certain words or representations but is recognized as a label whose attachment depends upon the circumstances of dissemination, it follows that the same publication may be regarded as obscene in the hands of one group of persons and innocuous in the hands of another. The judicial determination that a publication is obscene would thus depend upon a finding that the material would have an adverse affect upon a susceptible audience and that it was, or was likely to be disseminated to such an audience. Under the common law *Hicklin* formula, this principle found expression in the proposition that a publication was obscene if it tended to deprave and corrupt "those whose minds are open to such immoral influences and *into whose hands a publication of this sort may fall.*"[4] Similarly, some forms of Commonwealth anti-obscenity legislation oblige the courts to have regard to the impact of the publication on the "persons, classes of persons, and age-groups to or among whom, it was, or was intended, or was likely

to be published, distributed, sold, exhibited. . . ."[5] etc. Canadian legislation has no such provision though reference to the audience may take place in considering whether the public good was served under s. 159(3) or whether the work was one whose dominant characteristic was undue exploitation under s.159(8).

Under the concept of circumstantial obscenity the most explicit material will not be legally accounted obscene when distributed to a proper audience. The nature of the marketing does not change the content of the material but modifies its impact and, theoretically, by limiting the risk of harm sought to be avoided by the law, shields it from being legally declared obscene. The concept of circumstantial obscenity requires that particular attention be paid to identifying the audience. Only in cases of wide, indiscriminate dissemination would it be appropriate to use the general community as a standard against which to test the impact of the publication.

The concept of obscenity as circumstantial in nature is perhaps best demonstrated in the American case of the *U.S.* v. *31 Photographs*[6] in which proceedings were brought for the forfeiture and destruction of certain photographs, books and other articles which the Kinsey Institute for sex research at Indiana University sought to import into the United States. The relevant statute prohibited the importation of obscene matter and did not exempt scientific institutions from the prohibition. There was no dispute that the photographs and articles were of a pornographic nature, but counsel for the Institute contended that as the pornography would not be accessible to the general public, but was only to be used by *bona fide* research workers furthering the Institute's study of human sexual behaviour, there was no reasonable probability that it would be disseminated to a susceptible audience. The court accepted this argument and held that, in the possession of the Kinsey Institute, the pornography was not obscene even though it acknowledged that it would have held the same material obscene had an ordinary citizen attempted to import it. In coming to this decision the court expressly rejected the Government contention that matter existed which was legally "obscene *per se*" and held that it was not possible for material to be legally accounted obscene without reference to any beholder.[7]

The English Court of Criminal Appeal has come to a similar conclusion. In *R.* v. *Clayton and Halsey*[8] a book shop owner and his assistant were convicted of publishing obscene articles in contravention of the *Obscene Publications Act* (1959). The articles consisted of a packet of photographs which were bought from the defendants' book shop by two experienced police officers whose function it was to make such test purchases. Both officers agreed in evidence that they had examined many thousands of similar photographs in the course of their work and that the photographs did not arouse any feelings in them whatsoever. It was argued for the bookseller that the test of obscenity in the Act had not been satisfied since the photographs did not tend to deprave and corrupt the persons who were likely, in all the circumstances, to see them. Not only had the police officers acknowledged that they hadn't been depraved or corrupted by the photographs, but by the very nature of their employment they were not susceptible to the depraving and corrupting influence of such articles. Counsel for the Crown argued that the photographs were so inherently obscene as to tend to deprave or corrupt anyone to whom they were published whatever his occupation and whatever his evidence as to their effects on him. This argument was rejected and, in delivering judgement quashing the convictions, Lord Parker stated:

> "This court cannot accept the contention that a photograph may be inherently so obscene that even an experienced or scientific viewer must be susceptible to some corruption from its influence. The degree of inherent obscenity is, of course, very relevant, but it must be related to the susceptibility of the viewer."[9]

Acceptance of this principle leads to the conclusion that a person selling allegedly obscene material should be permitted to answer that the publication in question did not affect the consumer in any way that is the concern of the criminal law. What effects are the concern of the criminal law will be discussed in the next section, but it should be noted at this point that under Canadian legislation no specific provision exists to compel consideration of the impact of the publication on the specific audience to whom it was disseminated, or into whose hands it was reasonably likely to fall. In prosecutions under s.159 of the Code, forfeiture procedures under s.160 or prohibitions on importation under the *Customs Tariff Act* the court or government official takes as the potential audience the Canadian community at large.

It is suggested that the better view is to acknowledge that obscenity is never an intrinsic quality of written or pictorial material but that it is a chameleonic quality whose presence or absence in a publication must always legally be determined only after consideration of the time, place, and circumstances of dissemination and the impact upon the exact audience to whom it is directed. This means that a book may be held obscene in one part of Canada and not obscene in another. Indeed the same work may be the basis of a conviction in one case and an acquittal in another in the same city on the same day because, even though content of the publication has remained constant, the use to which it has been put, has varied. The same concept can be seen in operation in relation to the determination of what are house-breaking instruments under s.309(1)

of the *Code*. A screwdriver is not, inherently, a housebreaking instrument but the use to which it is to be put may bring it within the *Code* prohibition. So it is with obscenity; as Chief Justice Warren of the United States Supreme Court has observed:

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the material is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw colour and character."[10]

REFERENCES

1. (1957) 118 C.C.C. 317, 319 (Alta.S.C.)
2. *Ibid.*, 318-319.
3. *R.* v. *J.* (1957) 118 C.C.C. 30 (Alta.C.A.). See also *R.* v. *P.* [1968] 3 C.C.C. 129 (Man.C.A.) and *R.* v. *Munster* (1960) 129 C.C.C. 277 at 280-281 (N.S.S.C.). But compare *R.* v. *Goldbert & Keitman* [1971] 3 O.R. 323 (Ont.C.A.) — allegedly obscene film shown only to University community. Held no answer to argue film not obscene in hands of University viewers — community standards test under s. 159(8) requires consideration of National community standards of tolerance.
4. *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, 371 (emphasis added).
5. *E.g.* New South Wales; *Obscene and Indecent Publications Act* 1901-1955 s,3(3); Victoria; *Police Offences Act* 1958 s.164(2). However the Australian legislation is defective in that it proceeds to require the courts to consider the impact of the publication on the most susceptible of these classes or groups. Under the English *Obscene Publications Act* 1959, 7 & 8 Eliz. II c. 66, s.1 an article is deemed to be obscene if it tends to "deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see, or hear the matter contained or embodied in it." Following the decision in *Clayton* v. *Halsey*, the Act was amended so as to allow a wider potential audience to be considered: see *Obscene Publications Act* 1964, c. 74, s.1(3)(b).
6. (1957) 156 F. Supp. 350.
7. *Ibid.*, 358.
8. [1962] 3 W.L.R. 815.
9. *Ibid.*, 818.
10. *Roth* v. *U.S.* (1957) 354 U.S. 476, 495.

THE HARM FEARED

> "It is obvious that an individual may by unrestricted indulgence in vice so weaken himself that he ceases to be useful member of society. It is obvious also that if a sufficient number of individuals so weaken themselves, society will thereby be weakened."
>
> Devlin, *The Enforcement of Morals*, London, 1965, 111.

Obscene material is feared for many reasons; because it gives rise to sexual arousal or overt misbehaviour, because it lowers moral standards or involves commercial exploitation of sexual curiosity, or simply because it is offensive to viewers or readers. At common law, the *raison d'etre* of the law of obscenity was the avoidance of "depravity and corruption". In Canada the harm feared is "undue exploitation". These phrases have been used as though the dangers to the social order which they purport to describe were self-evident. But they are not, and what follows is an attempt to separate out and examine the various justifications offered for the legislative prohibitions on obscenity.

1. Sexual Arousal

In *Hicklin's* case, which set out the common law definition of obscenity, the harm that the court feared would flow from the sale of the publication in question was that:

> " . . . it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."[1]

The proposition discussed in this section is that the harmful effect of obscenity is to be found in the stimulation of sexual thoughts and arousal, independent of any risk that such erotic thoughts or state of arousal would provoke a reader into overt behaviour.[2] Studies conducted for the United States Commission on Obscenity and Pornography have indicated, not surprisingly, that sexually explicit material can and does cause sexual arousal or stimulation in adults.[3] The research also casts doubt upon the common belief that women are considerably less aroused by such erotic stimuli than are men [4] and it has been hypothesised that the supposed lack of female response is due to social and cultural inhibitions against reporting such arousal and to the fact that erotic material is generally oriented towards a male audience.

The belief that libidinous thoughts are harmful in themselves has its roots in Christian teaching that lustful thoughts are as great a threat to salvation as are lustful deeds:

> "Ye have heard that it was said by them of old time, Thou shalt not commit adultery: But I say unto you, That whosoever looketh on a women to lust after her hath committed adultery with her already in his heart."[5]

There are many variations on this theme, for instance, a catholic theologian has referred to "mental unchastity" as the harm to be avoided.[6] Such sentiments are expressions of concern for the dignity of man by individuals who feel that human sexual instincts should not be deliberately aroused purely for pleasure.[7] In similar terms, the brief for the United States in the Supreme Court case of *Roth* v. *U.S.*[8] identified "pleasure in sexual gratification, whatever the means" as the only objective of hard core pornography, and admonished that "the social value of such notions is, of course, nil."[9]

The justification offered by the draughtsmen of the American Law Institute's *Model Penal Code* represents an alternative formulation of concern for the readers' mental processes:

> "Literary or graphic material which disregards the social convention evokes 'repression-tension', *i.e.* mixed feelings of desire and pleasure on the one hand, and dirtiness, ugliness, revulsion on the other . . . Society may legitimately seek to deter the deliberate stimulation and exploitation of emotional tensions arising from the conflict between social convention and the individual's sex drive."[10]

It is difficult to see how exploitation of the tensions stimulated by curiosity and desire (tensions which are conceded to be normal) can be a justification for suppressing writing. While it may be entirely appropriate for

a religion to discourage its adherents from material which is likely to turn their minds from spiritual to carnal thoughts, it is questionable whether in the absence of additional utilitarian justification, such aspirations to propriety and holiness should be supported by penal legislation.

Another variation is found in the proposition that obscenity is harmful because, in promoting preoccupation with sexual thoughts, it diverts the reader from more worthwhile and creative roles in the community. C.H. Rolph writes:

> "A preoccupation with pornography, by isolating sensitive and intelligent men from those not so preoccupied, devalues many a personality and, in effect, robs society of many a gifted member."[11]

Abse argues that the deleterious influence of pornography lies in the fact that it "encourages people to luxuriate in morbid, regressive, sexual-sadistic fantasy and cultivates this morbidity in them, tending to arrest their development."[12] But this is really a disguised form of the complaint that pornography's primary use is a means of facilitating fantasy for solitary masturbation. The sociologist, Geoffrey Gorer, has observed.

> "It seems probable that the real (though unexpressed) fear of the legislators is that pornography will be used as a substitute for action rather than as an incitement to action, that the readers will find sufficient stimulation in the 'impure and lustful' thoughts and images evoked by pornography for complete gratification. In other words, it is feared that the consumers will find so much satisfaction from masturbation that they will fail in their heterosexual duties."[13]

Studies undertaken for the Commission on Obscenity indicated that exposure to sex stimuli increased the frequency of masturbation only among minorities of various populations and that the increased frequencies of masturbation appeared to disappear within 48 hours after exposure to erotica.[14] Moreover the researchers verified what had been long suspected, namely, that extensive exposure to sexually explicit material led to a satiation effect and a diminished desire for further viewing even though the material was freely available.[15]

In a world which is threatened by the immediacy of a population explosion, it is questionable that diversion from masturbation is a sufficient justification for the law to interfere. Moreover, even if sexual arousal through stimuli such as books and pictures were to be considered a socially undesirable result, there appears to be little evidence that obscenity laws can actually aid in diminishing arousing stimuli. We live in a society whose members tolerate, if they do not actively encourage, a great deal of eroticism in dress, art, literature, entertainment and advertising. Sexual thoughts and states of sexual arousal in human beings are inevitable; they are evoked by a myriad of stimuli which are often far removed from that which is ordinarily regarded as erotic. Insofar as sexual thoughts, arousal, or masturbation interferes with the salvation of an individual's soul, or his personal adjustment, control may be important from a theological or psychiatric point of view. But alone they constitute such an insignificant danger to the social order that it seems appropriate they be treated as the exclusive domain of the person concerned.

2. Overt Misbehavior

The primary utilitarian justification for the censorship of obscenity is the avoidance of overt misbehavior. This is based upon a tacit assumption that sexual thoughts evoked by obscene matter are somehow translated into actions which have undesirable consequences. There are two forms to the argument that obscenity provokes overt misbehavior in the reader or viewer. One regards the susceptible audience as consisting of the average person exposed to the obscenity, while the other emphasizes the effect of explicit sexual materials on adolescents and juveniles. In either case, it is usually assumed that the misconduct provoked will be of a sexual nature. This assumption involves the two subsiduary propositions: (a) that graphic representations of sexual behavior will lead to sexual arousal, and (b) that the sexual arousal will be exposed in conduct similar to that depicted in the particular representation involved. The first proposition finds strong support in clinical experience and empirical studies but even so it is subject to important qualifications. Cairns, Paul and Wishner in their analysis of empirical investigations into the effect of psychosexual stimuli,[16] warn that although a significant proportion of persons in the community (both adults and adolescents) are sexually aroused by some form of erotic stimulus in pictures or books, the same stimulus might have quite opposite effects on different individuals and even on the same individual at a different time. They are at particular pains to point out that:

> " . . . males differ among each other in terms of preference for and response to various types of sex stimuli . . . . The environmental circumstances under which the sex stimuli are viewed may influence the extent to which the viewers will show evidence of sexual arousal . . . . Exposure to certain types of sex stimuli is, for some persons both males and females, a distinctly aversive experience. Sexual guilt appears to be an important determinant of the extent to which viewing sexually relevant material will be considered an unpleasant event."[17]

The second proposition — that the reader or viewer will exhibit overt sexual behaviour similar to that depicted in the stimulating material — appears not to be established. According to a 1970 interview survey with a random sample of 2486 adults conducted under the auspices of the U.S. Obscenity Commission, 49% of the respondents indicated that they believed that sexual materials led people to commit rape.[18] Most of the evidence, however, turns out to be bare conjecture based upon intuition or generalizations broadly derived from sensational single instances.[19] Moreover, in cases where judges, police officers, prison guards or psychiatrists are heard to comment on an apparent relationship between obscenity and sexual offences, it is found that their opinion is often based on no more than an observation that those who are known to be socially maladjusted are interested in reading "sexy" material. Whether they are more or less interested in this material than citizens who make up the rest of the community is not considered and no attempt to unravel cause and effect is made. Coincidental possession does not establish a causal relationship.

A study conducted by research workers at the Kinsey Institute for Sex Research at Indiana University on sex offenders[20] compared different types of sex offender with each other, with men imprisoned for other offences, and with men never convicted of offences more serious than traffic violators. The study used a sample of 2721 men of whom 1356 were sex offenders. The most striking feature of the study was the small number of individuals who had never seen pornography — only 14 out of the total sample of 2721 — an indication that exposure to pornography is prevalent in at least some social classes. The belief that graphic representations of sexual activity strongly stimulated sexual arousal and promotes sexual activity was somewhat undermined by the researcher's finding that a large proportion of both sex offenders and control groups reported little or no sexual arousal from pornography. The responsiveness of sex offenders to pornography appeared to be less than the other groups. The researchers hypothesised that better educated and younger persons were more likely to be aroused by pornography because they had a tendency to be more imaginative and emphatic and this enhanced their sensitivity to psychological stimuli. Since the majority of sex offenders were neither well educated nor particularly youthful, it was thought possible to explain their relative unresponsiveness in these terms.[21] The conclusion was reached that pornography was not a consequential factor in the offenders' sex offences.

A series of studies by Thorne and his colleagues[22] provided direct support for the findings of the Institute for Sex Research investigators. Comparing sex offenders against females with men convicted of property crimes, the investigators concluded that sex offenders tended to report less stimulation from pornography and to hold more rigid attitudes concerning sex than did the control subjects. Other studies on smaller samples also reported that no differences were found between the two groups on measures of sexual arousal, and as far as previous exposure to pornography was concerned, that sex offenders generally experienced less frequent and milder exposure to pornography than did *Criminal Code* offenders.[23] Other studies undertaken at the request of the Obscenity Commission led the commissioners to report:

> "Studies show that in comparison with other adults, sex offenders and sexual deviants are significantly less experienced with erotica during adolescence. As adults, sex offenders are not significantly different from other adults in exposure or in reported arousal or reported likelihood of engaging in socio-sexual behaviour following exposure to erotica. Various studies revealed no significant differences between sex offenders and other groups in reference to whether erotica had affected their morals or produced preoccupation with sexual materials. When explicitly given the opportunity to do so, a small minority of sex offenders say that erotica or pornography had some relationship to their committing sex crimes, but [because of the nature of the question, the ambiguity of the findings, and the weight of other available research comparing sex offenders and other persons] these data cannot be regarded as reliable evidence of such a relationship. Sex offenders generally report sexually repressive family backgrounds, immature and inadequate sexual histories and rigid and conservative attitudes concerning sexuality. Research suggests that childhood experiences which encourage sexual repression and inhibition of sexual curiosity are associated with psycho-sexual maladjustment and anti-social sexual behavior."[24]

Though attempts to correlate pornography with criminal sex behavior have so far yielded negative results, it might be premature to conclude from the studies that obscene or pornographic stimuli play no role whatsoever in the elicitation and maintenance of anti-social behavior. Cairns[25] particularly warns that the studies undertaken are relatively insensitive to the possible "triggering" functions that sexually explicit material might have served for the sex offender. At this point of time, however, it would be accurate to say that the various studies, as a whole, fail to establish a meaningful causal relationship, or even significant correlation between exposure to erotica and anti-social behavior among adults.

The Commission on Obscenity also considered the relationship between availability of erotic materials over the last decade and the incidence of sex offences both in the United States

and Denmark.[26] Their U.S. conclusion was that, although the evidence showed that adult arrests for sex offences had increased, the increase had not been as great for these offences as for other serious offences such as robbery and narcotic law violations. Moreover, arrests for sex offences constituted no more than 2% of all adult arrests during the period 1960-69. The Commission was of the opinion that if the increased availablility of sexually explicit material were directly related to the incidence of sex offences, a greater increase of arrests for sex offences should have occurred.[27]

The Danish experience after repeal of the obscenity laws is thought by many to be relevant to predicting the consequences of similar action in North America. In 1967, following the recommendation of the Permanent Criminal Law Committee, Denmark abolished all restrictions on the sale of pornographic literature to adults. This was followed by a considerable fall in the circulation of obscene books and a sharp rise in sales of pornographic pictures. In 1969 the Danish Parliament also removed restrictions on the sale of pictorial pornography to adults while maintaining the prohibition on its display in public places. Opinion polls in 1970, a year after the final legalislation, showed that 57% of the population agreed with the measures.[28] During the 1960's there was a dramatic decrease in the number of sexual offences registered by the police in Copenhagen. The decrease took place in all forms of sex crimes although the largest drop was in offences of peeping, exhibitionism, and indecent interference with girls, while there was only a small decrease in registered cases of rape or attempted rape.[29]

Attempts were made to determine whether the reported decrease in sex offences was attributable to changes in criminal legislation, law enforcement practices, reporting of official statistics, individuals' subjective definitions of sex crimes (*i.e.* persons who might formally have considered themselves "victims" of "sex crimes" might no longer consider themselves in that light), readiness to report sex crimes to the police or the actual number of persons objectively victimized by sex crimes. Kutschinsky has asserted that there is evidence to support the tentative conclusion that in at least two types of sex crime, namely, peeping and physical indecency toward girls, the abundant availability of hard-core pornography in Denmark may have been the direct cause of a considerable actual decrease in the numbers of such offences committed.[30]

Whether or not this conclusion can be maintained in the light of further research, the fact remains that reported sex crimes in Denmark declined in frequency at a time when the availability of a great variety of explicit sexual material had increased. This is, at least, strong evidence that the availability of such material does not *increase* reported sex offences and, impliedly, is not a critical factor among the causes of sex offences.

Particularly strong fears are held in relation to the effect of exposure to obscenity on the conduct of juveniles. Obscenity has been declared to be a ponderable factor in juvenile delinquency.[31]. But again the claims are not founded upon comprehensive studies involving the use of control groups of non-delinquents. Usually they are based upon the anecdotal experiences of a variety of observers working amongst delinquents.[32] The view that obscenity has a vitally important influence on the behaviour of juveniles carries with it the implication that delinquency can usually be attributed to a single or major causative factor. This is an idea which has long since been rejected by those engaged in delinquency research. Nowadays the nature and quality of interpersonal relationships and sub-cultural pressures are recognized as being far more significant determinants of delinquents conduct than vicarious experience however stimulated. During the decade 1960-69, there was a considerable increase in juvenile crime and illegitimacy in the United States but the role of erotica in relation to these phenomena is unknown.[33] Specific studies undertaken on behalf of the Obscenity Commission attempted to assess the extent to which youths were experienced with erotic materials. The studies indicated that about 80% of American males and 70% of females had seen visual representations or had read written descriptions of sexual intercourse by age 18. A further series of studies suggested that the proportion of youthful offenders who were familiar with sexually explicit material was not significantly different from the proportion of other adolescents and young adults who had such experience, regardless of their age or social background.[34] The Commission summarizes its findings in the following terms:

> "Delinquent and non-delinquent youth report generally similar experiences with explicit sexual materials. Exposure to sexual materials is widespread among both groups. The age of first exposure, the kinds of materials to which they are exposed, the amount of their exposure, the circumstances of exposure, and their reactions to erotic stimuli are essentially the same, particularly when family and neighbourhood backgrounds are held constant. There is some evidence that peer group pressure accounts for both sexual experience and exposure to erotic materials among youth."[35]

There is, therefore, no stronger case with respect to the behavioral impact upon juveniles than there is in relation to adults. The separate question of the role of obscenity on the development of sexual attitudes and values in juveniles is considered in the next section.

It is occasionally argued that the publication of obscenity should be prohibited because the state of sexual arousal created is likely to be relieved in anti-social conduct which is not necessarily sexual in nature, particularly in those individuals who already lack adequate internalized control of their aggressive impulses. However the precise effect obscenity has on such persons, and the extent to which it is more potent than the numerous other erotic stimuli available remains unclear. Scientific data is lacking and the evidence adduced, is, at best, tangential and fragmentary so that the validity of this assertion can neither be confirmed nor denied. Moreover, it may never be resolved because, apart from any transitory state of arousal or revulsion, the impact of obscene material on the non-sexual conduct of the reader or viewer will tend to be completely masked by the numerous other internal and external stimuli which impinge upon him.

The belief that obscenity has a harmful impact on the outward behaviour of adults or adolescents is ultimately grounded in intuitive processes, clinical judgement and guesswork. Opposing views are generally based on the same shaky foundations although the sex offender and Commission delinquency studies provide some scientific support for the view that obscenity is not the significant causal factor in criminality claimed. If anything the research suggests that the issues are more complex than a simplistic condemnation of obscenity alone would allow. In the absence of trustworthy and unambiguous information concerning the effects of obscenity on outward behaviour, it would seem that the overt misbehaviour rationale of obscenity law is so severely undermined that it can hardly be presented alone as sufficient justification for invoking penal measures.

3. Change In Moral Standards

Related to the "overt misbehavior" rationale for censoring obscenity is the fear that in the long run the sexual thoughts stimulated by obscene matter will somehow lead to a breaking down or lowering of the moral standards of the community. Here the emphasis is on delayed and long range effects of exposure to obscenity rather than on any immediate risk of incitement to anti-social conduct and, again, anxiety is expressed separately in relation to the community at large and juveniles. The harm feared was succinctly described by Mr. Justice Taschereau in the Supreme Court of Canada as the "legalized assault against morality."[36] The implication is that material which attacks commonly accepted standards of sexual morality might actually subvert the moral *status quo*. Underpinning this argument is the theory that public morality is indivisible in the sense that one aspect cannot be corrupted without affecting the rest, and that therefore those who deviate from any part would probably deviate from the whole:

> "The standard of values within the ambit of public morality as those values exist from time to time must be protected otherwise there would be no cohesion in our society. Everybody would set their own standards: society would disintegrate and there would be social chaos."[37]

This rationale focuses on preserving community morals with virtually no consideration of whether the impact on morals will result in conduct which is immoral or illegal, though this is implied. It is agreed that internalized moral standards are of importance in determining and regulating individual conduct, yet the role of obscene material in modifying conduct by bringing about changes in moral standards, is so remote and difficult to prove that the formulation of this justification of obscenity legislation must take the form that it is concerned with the preservation of morals *per se*. In any event, since obscenity legislation is as much aimed at scatological content as sexual, (the former is less likely to lead to any unlawful or immoral act since its effect is emetic rather than aphrodisiac) the morals justification must be kept distinct from the overt misbehavior rationale.

The argument for prohibiting obscenity on the grounds of moral danger is presented at various levels of generality. In their dissent from the Commission on Obscenity and Pornography Report, Commissioners Hill, Link and Keating broadly affirmed:

> "We believe that pornography has an eroding effect on society, on public morality, on respect for human work, on attitudes towards family love, on culture."[38]

Recently, a Canadian judge expressed more specific fears in the following terms:

> "An assault by the promoters of free love upon established public morality must be viewed by the reasonable man as a weakening of the societal structure. However, the assault is seldom direct and, in its obliquity, becomes insidious. The flood of material written, pictorial and spoken, appears to have the purpose of creating in people an almost subliminal effect — a consciousness

> that fornication, besides being desirable, is universally acceptable. In actual fact, it is an attempt by a few, not to nurture community standards, but rather to change them . . . This undermining of an accepted public morality turns that which is a noble and essential expression of higher love into something tawdry, cheap and offensive. This cheapening of something vital in the human psyche is a wrenching out of context of a gift to humanity that was designed to give cohesiveness and stability to the family, the very keystone of society. In this sense it is a . . . undue exploitation of sex by reason of its lack of appropriateness and its unwarranted intrusion upon established morality."[39]

Or, again, the danger may be found in the possibility that what is presently regarded as offensive may, in time, become accepted as normative. A recent commentator makes the point forcibly:

> "When the movie version of *Gone With the Wind* first appeared, Clark Gable's famous exit line, 'I don't give a damn,' aroused considerable objection. Today nothing short of 'Fuck you, Scarlett" could have a similar effect. Perhaps the distance travelled between 'damn' and 'fuck' is lamentable, but the point is that the first amendment [guarantee of freedom of speech] postulated a willingness to take chances with the future development of society by relying on the free exchange of ideas."[40]

The opposing view is that, far from being a signal of corroding moral decline, the changes in sexual morals are signs of vigour and health. The tolerance or acceptance of sexually explicit material is regarded as representing a divesting of crippling immature notions of sexuality and the functions of the human body and a preparation for new sexual standards which represent a more mature level of eroticism. The whole issue is clouded by terminological inexactitude for in this context "morality" is portmanteau word of such expandable capacity that anything remotely relevant will fit into it if so desired by the person using the term. It may embrace moral concepts, attitudes, standards of behavior, religious dogmas, social mores, and even matters of taste and manners.[41] None of these categories command unanimous assent or practice.

The desire to avoid movement towards more permissive standards of sexual morality is of particular significance in relation to the "undue exploitation" provision defining obscenity in the *Criminal Code*. It will be pointed out later that, as a result of judicial interpretation, whether the exploitation of an emphasis on sex in an allegedly obscene publication is "undue" must be tested against the "community standards" of acceptance. It is therefore entirely open to Canadian courts to use the community standards interpretation as a means of preserving the current sexual mores by censoring matter describing or advocating non-conformist sexual conduct, regardless of whether any harm can be shown to flow from the non-conformity. There are two main objections to this type of moral conservatism in the law of obscenity. The first refers to the question of causal relationships, while the second involves demands for the liberty to advocate change.

The difficulties met in attempting to determine whether a causal relationship exists between exposure to obscenity and overt misbehavior have already been discussed. The same difficulties exist, *a fortiori* in respect of the relationship between obscenity and changes in moral standards governing sexual relations. The factors that influence the development and modification of moral standards are so numerous and complex that it is impossible to isolate the impact of obscene books. It cannot be denied that changes in an individual's standards of conduct can be brought about by book learning. And if decent books can inculcate acceptable attitudes and moral values then, equally, a person can acquire perverse attitudes and values from obscene writings. But why should obscenity have the extraordinary ability to change values that are ascribed to it? The English psychoanalyst Robert Gosling has noted that if the popular notion of the power of obscenity is true, "it must be about the most effective teaching material ever invented."[42] It is a long step in logic to conclude that because a person is exposed to graphic descriptions of sexual immorality he will be led to adopt such standards himself, despite all his earlier conditioning to the contrary. Indeed Dr. Gosling points out:

> "In the adult the internal structure of the personality that regulates the discharge of sexual impulses is fairly stable and is not easily altered. This stability is attested to by the long time required for any effective psychotherapy. Although the impact of pornographic material may temporarily disturb the balance of forces within the personality, cause sexual excitement, and so prompt some sexual activity, it is doubtful if it significantly alters the underlying and persisting structure, which depends far more upon the ingrained experiences of childhood than it does on passing new encounters."[43]

The Commission on Obscenity and Pornography studies into attitudinal, emotional, and judgmental responses to erotica indicated that exposure to pornography tends to liberalize attitudes towards whether such material is harmful and whether it should be restricted. The U.S. national survey conducted by the Commission also indicated that Americans who had more experience recently with erotic material tended to

tolerate homosexuality, premarital intercourse, and the non-reproductive functions of intercourse to a greater extent than those inexperienced with erotica. Whether any causal relationship can be made out has not yet been resolved and even if the connection was established, whether such attitudes represent the ebbing of communal moral standards to an extent calling for the intervention of the criminal law remains a separate, debatable, point.

The use of obscenity law simply to maintain existing moral standards in the community is objected to on a second ground, namely that it is not a proper function of the criminal law to suppress attacks on existing morality where there is no punitive utilitarian justification for doing so. Indeed, it may be argued that attempts to maintain a set of moral precepts which are religious in origin may well represent state imposition of authoritarian moral pronouncements and so represent a violation of Canadian conceptions of freedom of religion and speech.

Even if conventional moral attitudes did change in a permissive direction as the result of the widespread dissemination of obscenity, this would not mean that the morality of the community had been lowered or subverted in any absolute sense. Changes in social morality (including sexual mores) may be seen as normal and legitimate evolutionary developments in any community unless one subscribes to the view that current moral standards have the status of divine revelation or eternal truth, and, as such, ought to be legally enforced. Furthermore, the possibility of successfully preserving the moral *status quo* by legislative means is so remote, and the cost of restriction in free debate and personal liberty so great, that the use of obscenity law to suppress matter simply because it might change moral standards appears entirely unjustified.

The regulation of access of juveniles to sexual material on moral grounds has always been regarded of great moment.[44] In writing of the history of Canadian anti-obscenity legislation, W.H. Charles notes that many who testified in 1952-53 before the Canadian Senate Committee believed that obscene material would provide youngsters with a distorted view of the nature of men and women:

> "The emphasis upon the sexual appetites of man, it was felt, would result in the grace and dignity of man being ignored. In the same way the repetitious portrayal of the relations of men and women as primarily physical in nature would give young people the erroneous impression that women were essentially immoral and worthy of no respect whatsoever."[45]

This argument is based on the view that adolescents have not developed stable attitudes towards sexual conduct since they are still in the process of discovering their own sexuality and the community standards which govern its expression. They may thus be seen as being in a particularly vulnerable stage of their sexual development, and obscenity (especially in the form of pornography) may constitute a danger insofar as it distorts and misrepresents communal values and teaches deviant standards of sexual conduct. It is argued, moreover, that anti-obscenity legislation would reduce such distortion in the sexual education of children and would aid in the maintenance of parental control both over that education and over the content of the sexual communications to which their children are exposed. Without such control, decisions relating to the material to be made available to children will be left in the hands of commercial distributors whose profit motive, rather than concern for the welfare of the child, would constitute the primary consideration. Although, intuitively, this argument may seem to have merit, it still tends to over-estimate the effectiveness of obscenity as teaching material and to under-estimate the importance of social and inter-personal relationships in adolescents' learning of moral values.

As previously mentioned, the Commission on Obscenity and Pornography found no evidence to suggest that exposure to explicit material led juveniles to commit delinquent acts, but a significant deficiency in the work of the Commission was the failure to comprehensively study the effects of erotica on children and juveniles whose sexual behavior was not yet fixed. Ethical considerations and social taboos prevented such experiments even though there was evidence that adolescents had considerable experience with sexual material. Longitudinal studies of the consequence of exposure to erotica among youngsters with similar social and demographic characteristics is the type of research that is envisaged as being particularly needed.[56]

If the community does feel an urgent need to protect its youngsters from the alleged dangers of long-term exposure to obscene matter by enacting legislation specifically prohibiting the dissemination of obscenity to children under a certain arbitrarily determined age, or by reference to specific types of publication such as crime comics,[47] it must be clearly recognized that such prohibitions cannot yet be founded upon scientifically established facts as to the effect of obscenity on juveniles. They can be no more than the legal expression of deeply felt parental anxieties, and they must find their justification in the view that the protection of children and adolescents from risk of moral harm (even though the danger is remote) is a value of far greater significance than unregulated freedom of expression and that, with adequate protection for access to this material by adult audiences, the interference with free expression involved is only slight.

A major counter-argument in relation to the moral harm rationale relates to the proposition that a significant function of pornographic material is the provision of needed information on sex. The national survey conducted for the Commission on Obscenity and Pornography indicated that it was not uncommon for adolescents to first obtain sex information from explicit sexual materials in the course of socializing with their peers.[48] This was not, however, their preferred source of sexual information and this, in part, led the Commission to make a number of non-legislative recommendations regarding the launching of sex education programmes which could provide accurate and reliable sex information through legitimate sources. The Commission also expressed the belief that such information would generate healthy attitudes and orientations towards sexual relationships, and would provide better protection for youngsters agains distorted ideas.[49] They saw this is a powerful, positive approach to the problems of obscenity and pornography especially in relation to the young.

4. Commercial Exploitation

Increasingly a quasi-economic justification for the prohibition on obscenity is advanced. The tenor of the argument is that making money out of people's interest in, or weakness for, obscenity is a particularly detestible activity which ought not to be tolerated. To disseminate obscene matter is bad enough, but to do so for financial profit is to rub salt into the wound. Pornography has been described as "dirt for money's sake"[50] and the *Criminal Code* expressedly recognizes the commercial side of the dissemination of obscenity in s.160, which authorizes the seizure and forfeiture of obscene publications kept for sale or distribution. It is also argued in support of the commercial exploitation rationale that if production and circulation of obscene material for gain could be eliminated, the supply would be cut off its source. The compilers of the American Law Institute's *Model Penal Code* were so concerned with the fear of commercial exploitation that they went so far as to propose that not only the disseminator of actual obscenity be punished, but also the person who promoted the sale of non-obscene material by advertising it as being obscene.[51] While this proposal may be admirable when set out as a governing principle in regulatory provisions dealing with false advertising generally, there is no good reason to single out misrepresentation in the promotion of obscenity as a special case unless money made from sexual exploitation is thought to be uniquely tainted.

It would not be unreasonable to expect that organized crime, with its traditional interest in providing illegal goods and services, should be represented among the producers and distributors of illegal sexual publications.[52] In the United States context the Commission on obscenity found itself unable to draw any conclusions with respect to the involvement of organized crime in the distribution of obscene material. It did note however, that there was evidence that the book stores retailing sexually explicit material tended to involve individuals who had considerable arrest records. They attributed this to the fact that such businesses were at the periphery of legitimacy and at the margin of legality and consequently were avoided by persons with greater concern for legitimacy and general reputation. This was not, however, the same as "being run by organized crime."[53] The extent to which criminal elements are involved is likely to depend more upon the degree of illegality which is attached to the industry and which closes it to legitimate economic competition, than upon any special affiliation between obscenity and crime.

It is obvious that one function of the dissemination of sexually explicit material is to make profit for the producers and distributors. This form of economic activity also provides paid work for their employees and for sellers at the end of the distribution line. It also provides employment for the disseminators' professional opponents. But in a capitalist society, such as Canada which has long been exploiting sex for commercial purposes, it scarcely seems appropriate to make the profit motive a ground for the censorship of obscenity. It would be anomalous, to say the least, to permit the sale of some products and services designed and sold primarily to exploit sexual interest, but to prohibit commercial capitalization upon the same interest through the sale of books, magazines, or films. Indeed s.159(5) of the *Criminal Code* declares that the motives of an accused are irrelevant for the purposes of a charge under s.159 and it has been held that "undue exploitation" in s.159(8) does not mean making profit out of sex.[54] Moreover, the very fact that there is a sufficiently intense and widespread interest in sex to be exploited suggests that no prohibition upon commercial exploitation is likely to be successful.

5. Offensiveness

It seems that, to a large extent, obscenity is prohibited not because it is dangerously alluring, but because it is grossly offensive. The harm feared is not sexual arousal, anti-social behavior, lowered moral standards, or commercial exploitation, but simply that obscene matter is likely to arouse powerful feelings of shock, shame, disgust and revulsion in those who are exposed to it. It may be argued that in the same way as the defence of provocation is a manifestation of the criminal law's appreciation of ordinary human frailty,

so prohibition on obscenity constitutes a legal recognition both of the existence of deeply entrenched cultural taboos on exposing or depicting intimate detail of sexual interaction or excretory activity and of the principle that individuals should not be forced to respond to certain forms of unpleasant stimuli.[55]

The fact that sexual material gives offence to some will not be sufficient reason to prohibit its general distribution in a society which places high value on freedom of expression. Nevertheless, there is evidence to indicate that a substantial proportion of those who have had experience with erotic material react with feelings of disgust.[56] The legal protection of such feelings, however, requires that a distinction be drawn between voluntary and involuntary offence. The former involves a situation in which the citizen is offended by obscenity in material which he has voluntarily chosen to read or view. On the other hand, involuntary offence describes the affront to a person's sensibility which occurs when unsought obscenity is thrust upon him in his use of places of public resort or through other forms of communication such as radio or television broadcasts, public displays in stores, store windows, billboards, theatre hoardings and the like, or in the mail.

(a) *Voluntary Offence*

The avoidance of voluntary offence is an insufficient justification for prohibiting the availability of explicit sexual materials. The protection of citizens from being shocked and revolted by what they have voluntarily chosen to read or view is a trivial ground for invoking the criminal law.[57] If they willingly seek out offensive material they cannot complain if they are offended. And if a person starts to read a book or magazine which unexpectedly turns out to be obscene, there is no obligation on him to continue once he has discovered its true nature. Though a person in the latter situation may be embarrassed by the initial obscenity he has unavoidably read or viewed, or may be possibly distressed by the thought that other readers might be similarly misled, his emotional reaction is likely to be only of momentary duration. The risk of this type of temporary distress in sensitive individuals can hardly be regarded as a "harm" sufficient to outweigh the value of free expression.

If this danger is thought to warrant legislative intervention, the matter can be sufficiently dealt with by a requirement that explicit sexual material be labelled "adult sexual material" and that films, if not already given a restricted classification by provincial censorship tribunals, carry a box office warning (as is now often done) that parts of the film may be offensive to some persons. Such legislation may well lie more properly in the realm of consumer protection or false advertising than in the criminal law.

(b) *Involuntary Offence*

Citizens have usually been offered protection from physical discomfort or mental distress in their use of places of public resort through the law of public nuisance. At common law, and under the Criminal Code, the offence of public nuisance is constituted by actions that materially interfere with the rights which all members of the community are entitled to enjoy, or by conduct which seriously discomforts the public.[58] Apart from nuisance in the form of threats of a directly physical nature such as infectious disease, noxious fumes, or obstruction of a highway, the law also recognizes nuisances which only threaten adverse psychological reactions, *e.g.* arousal of feelings of disgust and revulsion by public displays of physical horror or indecency.[59]

In many respects the legal concept of obscenity can best be understood merely as an aspect of the law of nuisance in that it serves as a means of abating the public offensiveness of blatant displays of sexual or scatological intimacy. A number of judges have recognized the public nuisance aspect of the dissemination of sexual material:

> "The mischief resides not so much in the book or picture *per se* as in the use to which it is put. What is in a real case a local public nuisance."[60]

The public exposure of obscene writing or representation is forbidden for the same reason that indecent exposure, public nudity, and obscene language in public are prohibited; not because they are likely to be imitated by others, but simply because they affront passers-by who claim the right to be free from such unwanted exposure. While an individual need not go to a nudist film if he does not like pictures of genital nudity, it is more difficult to escape the billboards, or drive-in theatre screens visible from the highway or nearby houses. Material on public display is being disseminated indiscriminately to passers-by and the offence is direct, immediate and not capable of being avoided by regulating subsequent action short of surrendering the right to make use of places of public resort. Both the Danish and American experiences in this regard are worthy of note. In Denmark, and the larger American cities, the liberalization of obscenity laws was accompanied by a greater public visibility of the erotica being sold in the stores. And recently in both communities there has been increased attention paid to the enforcement of police regulations limiting the degree of public display permissible.[61]

The voluntary offence rationale is not confined to offensiveness in public places. George Steiner has strongly argued against pornography on the ground of its offence to individual privacy[62] and others have joined in this response by contending that recognition of the right to be free from involuntary exposure should result in legislation prohibiting the mailing of obscene literature or advertisements to persons who do not desire to receive it. Other forms of communication such as radio, television or newspapers would appear to fall more properly under the category of voluntary offence.

It must again be emphasised that the offensiveness justification for the law of obscenity does not consider whether the dissemination of such material is immoral, or a cause of anti-social behaviour. It simply proposes that the display of obscene matter in the face of an involuntary public seriously offends the sensibilities of ordinary citizens, a substantial proportion of whom do not desire to view it and, further, that it is no great infringement on individual liberty to insist that displays of this nature either take place in private to a voluntary audience, or conform to the current minimum accepted standards of public decency. An actress friend of George Bernard Shaw put it neatly when she said, "I don't mind at all what people do, as long as they don't do it in the streets and frighten the horses."[63]

6. The Audience To Be Considered

If some forms of sexually explicit material are regarded as obscene *per se*, the actual audience to whom they are distributed is irrelevant, and the adverse impact of the book is assumed simply by reference to its contents: the harm is inferred by the court as a matter of law from perusal of the publication complained of. If obscenity is recognized as being circumstantial in nature, the audience must always be considered and an identical publication may be held obscene when distributed to one class of person and not obscene when distributed to another depending upon the effect it has on the respective groups. On this view, the extent to which any of the harms discussed above are likely to be brought about by the dissemination of an obscene work depends ultimately upon the nature of the audience into whose hands the work may fall. This emphasis on the circumstances of dissemination demands careful delineation of the persons to whom the alleged obscenity is, or is intended to be directed. Two situations arise, (a) limited dissemination and (b) indiscriminate dissemination.

(a) *Limited Dissemination*

If there is clear evidence that the obscene material was or is being disseminated to a special limited class or group of person such as doctors, psychologists, lawyers, university students, delinquents, etc., the obscenity of the work would be decided in the light of evidence of its effect on that class or group alone and not upon any incidental peripheral viewers or readers. Evidence (including evidence of the price at which the publication was sold) would be admissible for the purpose of identifying the special class of persons among whom the offensive material was likely to be distributed and also for the purpose of informing the court of the likely reaction and probable behaviour of those persons. Under present Canadian law the judge may not confine his inquiry to the effect on the particular group or class exposed but must test the alleged obscenity against a hypothetical national community standard. This holds true even if the material is disseminated to a narrowly defined audience *e.g.* labelled "adult"[64] or shown only to those at a university.[65]

(b) *Indiscriminate Dissemination*

The audience to be considered would become a problem in the situation in which there has been indiscriminate dissemination of offensive matter to the public at large. The difficulty here is whether the obscenity of the work is to be judged by reference to normal or abnormal persons, adults, adolescents or children?

(i) *The "Most Vulnerable Person" Test*

In the *Hicklin* case, Lord Chief Justice Cockburn in setting out the common law definition of obscenity referred to the most vulnerable as the relevant audience *i.e.* "those whose minds are open to . . . immoral influences" and he made special reference to the young.[66] The attitudes of the courts subsequent to *Hicklin's* case has generally been to assess the obscenity of the work in the light of its supposed effect on those members of society with the lowest level of intellectual and moral discernment — the young, the sexually immature and the abnormal. The danger of preoccupation with those who are most vulnerable is that normal or average adults may be denied access to material because the court has formed the opinion that young or abnormal members of the community might be adversely affected. This is, as one American judge has put it, "to burn the house to roast the pig."[67]

(ii) *The "Average Man" Test*

The main alternative suggested is that, in cases of indiscriminate dissemination, the obscenity of the publication ought to be tested by reference to its effect on the "average" members of the community.

The compilers of the American Law Institute's *Model Penal Code* recommended that:

> "The normal or reasonable man rule is clearly the proper one for state regulation of publication, if all art, literature and journalism is not to be degraded to the level of dullness and innocuity . . . criminal laws . . . should not jeopardize communications that ordinary people regard as fit for the eyes and ears of their peers."[68]

At the same time they recognized the need to give affect to community demands for protection of the particularly vulnerable. The end result was a recommendation that obscenity be judged with reference to "ordinary adults" unless:

> " . . . it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."[69]

In Canada the average man test finds expression through the community standards test of obscenity. In his dissenting judgement in *R* v. *Dominion News and Gifts Limited*[70] (subsequently approved and commended unreservedly by the Supreme Court)[71] Mr. Justice Freedman noted that the standards must be contemporary Canadian standards and that they:

> " . . . are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste or habit of mind. Something approaching a general average of thinking and feeling has to be discovered."[72]

The use of the "average man" in obscenity cases is based on the use of the famous "reasonable man" of the civil law of wrongs. This "excellent but odious"[73] gentleman is the theoretical embodiment of all the qualities demanded of a good citizen and is presented to the civil jury as the standard against which the defendant's conduct is to be judged. Only the broadest outline of the reasonable man's character is drawn by the judge, the rest is left to the jury. If the "average man" test is to be used at all it seems not unreasonable that it should be interpreted by a jury for the jury enjoys a closer affinity to the "average man" than any magistrate or judge. In the final analysis neither individual judge nor jury can do more than blindly guess at the qualities and likely responses of the "average man". The admissibility and use of scientific evidence on the nature of the audience thus becomes as important in determining the "average man's" response to indiscriminate dissemination of sexually explicit material, as it is to the determination of the effect on special groups of limited dissemination.

(iii) *The "Primary Audience" Test*

A third approach has been suggested by Professors Lockhart and McClure[74] who reject both the "most susceptible person" and the "average man" as appropriate standards for testing obscenity in cases of indiscriminate dissemination. They deny that indiscriminate dissemination of obscenity, in any real sense, ever takes place. The thrust of their argument is that most obscene material is not directed to and does not reach the general public. It is their belief that the substantial variations in audience appeal which occur in other types of writing or representation also apply in relation to obscenity. This leads them to conclude that although obscene matter may be publicly offered, it in fact only reaches a limited segment of the general public. This limited segment they describe as the "primary audience" and obscenity is to be tested by reference to a hypothetical person typical of that audience. The effect of the publication on persons representing peripheral audiences is not considered. By urging a closer examination of the actual audience exposed to the offending publication, Lockhart and McClure are obviously attempting to avoid the arbitrariness inherent in the legislative policies which express deliberate preference for the protection of particular groups of individuals in the community without regard to their number or proportion in the total audience actually reached. Support for the Lockhart and McClure position is found in the studies of patrons of adult book stores and theatres undertaken by the Obscenity Commission in order to identify the characteristics of people who bought erotic material. The profile of the patron of adult bookstores that emerged from observations made in different parts of the United States was of a white, middle-aged, middle-class, married, male, dressed in business suit or neat casual attire, shopping alone.[75] Similar observations in Copenhagen characterized consumers as middle-aged, middle-class, white males, at least a quarter of whom were estimated to be from another country.[76] Similar profiles were obtained from observations of audiences of theatres showing adult films and patrons of arcades showing sexually explicit peep-shows.[77]

It would follow that if the specific primary audience can be identified in this fashion, the obscenity of the publication must be tested by reference to this group alone. If the sexual arousal and commercial exploitation justifications are untenable, and the overt misbehavior and change in moral standards rationales insufficiently established in science, the only remaining justification is that of offensiveness. But if the "primary audience" has voluntarily chosen to read or view the material (as in the case of patrons of adult bookstores, theatres or arcades), this justification for the prohibition on obscenity cannot be maintained, and these individuals should be free to pursue their interest in sexually explicit material. This is so because, under the doctrine of circumstantial obscenity, the material in these circumstances is not legally offensive in their hands. If, on the other hand, protection of juveniles was the rationale and the primary audience was juvenile, the material would be obscene in their hands, the voluntariness of their consumption would be no answer, and the person who disseminated the material to them would be liable to punishment.

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19. See Wertham, *Seduction of the Innocent*, London, 1955. In 1957 J. Edgar Hoover, late Director of the United States Federal Bureau of Investigation, wrote: " . . . an overwhelmingly large number of sex crimes is associated with pornography. We know that sex criminals read it, are clearly influenced by it . . . Pornography is a major cause of sex violence", quoted in Murphy, *Censorship: Government and Obscenity*, Baltimore, 1963, 137. See also Hoover, "Combating Merchants of Filth: The Role of the FBI", (1964) 25 *University of Pittsburg Law Review* 469; Kyle-Keith, *The High Price of Pornography*, Washington, 1961, ch.4; Clor, *Obscenity and Public Morality*, Chicago, 1969, 136-146.
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21. This hypothesis is also discussed in Kinsey, Pomeroy and Martin, *Sexual Behavior in the Human Male*, Philadelphia, 1948, 363.
22. *Working Papers of the National Commission on Reform of Federal Criminal Laws*, 1231, n.1.
23. Cook, Fosen and Pacht, "Pornography and the Sex Offender: Patterns of Previous Exposure and Arousal Effects of Pornographic Stimuli", (1971) 55 *Journal of Applied Psychology* 503.
24. *Commission on Obscenity and Pornography*, 286.
25. *Working Papers of the National Commission on Reform of Federal Criminal Laws*, 1231, n.1.
26. *Commission on Obscenity and Pornography*, 269-272.
27. See also San Francisco Committee on Crime, *Report on Non-Victim Crime in San Francisco — Part II Pornography*, San Francisco, 1971, 68-69.
28. Fact sheet published by the Press and Information Department of the Ministry of Foreign Affairs of Denmark, 1971.
29. *Commission on Obscenity and Pornography*, 272-274; Kutschinsky, *Studies on Pornography and Sex-Crimes in Denmark*, Copenhagen, 1970, 99.

30. Kutschinsky, *ibid.*, 159.
31. Soper, in *Does Pornography Matter?, op.cit.* 50; Wertham, *Seduction of the Innocent, op.cit.*
32. See generally, Green, "Obscenity, Censorship and Juvenile Delinquency", (1962) 14 *University of Toronto Law Journal* 229, 232-241; Clor, *Obscenity and Public Morality, op.cit.*, ch.4; Kuh, *Foolish Figleaves?* New York, 1967, ch.18.
33. *Commission on Obscenity and Pornography*, 258-261.
34. *Ibid.*, 263-265.
35. *Ibid.*, 30-31.
36. *R.* v. *Brodie, Dansky & Rubin* (1962) 133 C.C.C. 161, 168 (S.C.C.). See Also *R.* v. *Berringer* (1959) 122 C.C.C. 350, 353 (N.S.C.C.); *R.* v. *Cameron* (1966) 4 C.C.C. 273, 285 & 289 (Ont.C.A.) and *Roth* v. *U.S.* (1957) 354 U.S. 476: "The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards", at 502 per Harlan J. .
37. *R.* v. *Coles Co. Ltd.* [1965] 2 C.C.C. 304, 317 (Ont.C.A.). See also Chaffee, *Government and Mass Communications,* Chicago, 1947, Vol. 1, 211; Devlin, *The Enforcement of Morals*, London, 1965, 115; Van den Haag, "The Case for Pornography is the Case for Censorship and Vice Versa," in Hughes (ed.), *Perspectives on Pornography*, New York, 1970, 122. Catholic proponents of the moral harm justification contend that man is forbidden by natural law to read literature that will "endanger the preservation of morality" and they suggest that "common man" has "built in" competence to tell him that obscenity subverts public morality: Hayes, "Survey of a Decade of Decisions on the Law of Obscenity," (1962) 8 *Catholic Lawyer* 93, 100; Amen, "The Church v. Obscene Literature," (1965) 11 *Catholic Lawyer* 21, 22-23. The contention that distribution of pornography leads to a decline in "civilization" is also discussed by the San Francisco Committee on Crime — *A Report on Non-Victim Crime in San Francisco: Part II – Pornography*, 1971, 70.
38. *Commission on Obscenity and Pornography*, 458.
39. *R.* v. *Beaudoin* [1972] 2 W.W.R. 140, 148 (Alta.Dist.Ct.).
40. Katz, "Free Discussion v. Final Decision: Moral and Artistic Controversy and the Tropic of Cancer Trials", (1969) 79 *Yale Law Journal* 209, 218.
41. *R.* v. *Marro* (1955) 113 C.C.C. 297, 302, (Mont. Court of Sess.).
42. *Does Pornography Matter?, op.cit.* 71.
43. *Ibid.*, 76.
44. *R.* v. *Marro* (1955) 113 C.C.C. 297, 302 (Mont. Court of Sess.); *R.* v. *Brodie, Dansky & Rubin* (1962) 132 C.C.C. 161, 176 (S.C.C.C.); Canadian Bar Association, "A Report of the Saskatchewan Sub-Committee on Civil Liberties on Censorship and Obscenity", (1960) 25 *Saskatchewan Bar Review* 80, 87.
45. Charles, *Obscene Literature and the Legal Process in Canada, op.cit.*, 284; Kuh, *Foolish Figleaves?, op.cit.*, 240-248; American Law Institute, *Model Penal Code,* (Tentative Draft No. 6), 55.
46. *Commission on Obscenity and Pornography*, 268.
47. As in the English *Children and Young Persons (Harmful Publications) Act* 1955; South Australia's *Children's Protection Act* 1936-1961 and California's *Penal Code* x.313 (see San Francisco Committee on Crime, *Report on Non-Victim Crime in San Francisco: Part II – Pornography* 73-74 and Appendix C); *Criminal Code* (Can.) s.159(1)(b).
48. *Commission on Obscenity and Pornography*, 314-316.
49. *Ibid.*, 54-55.
50. Kingsley, *International Pictures Corp.* v. *Regents of the University of New York* (1959) 360 U.S. 684, 692. See also *R.* v. *Brodie, Dansky & Rubin* (1962) 132 C.C.C. 161, 168 (S.C.C.). Mohr, *Report on the Study of Obscene and Indecent Literature,* Toronto, 1958, 64-65, provides some brief and now out-dated information on the profits made on magazine and pocket book distribution. The Commission on Obscenity and Pornography provides a detailed analysis of the various markets and sub-markets which distribute the variety of erotic materials available. The Commission makes the point that there is no monolithic smut industry but that various industries, varying in terms of media, content and manner of distribution exist. Some of these industries are susceptible to precise estimates of dollar and unit volume, others are not. The Commission panel on the traffic and distribution of sexually oriented materials in the United States provided the following estimate of the volume of traffic in relatively explicit sexual materials:

MATERIAL	Value $ Millions
"Adult only" books at retail	45-55
"Adult only" periodicals at retail	25-35
Motion Pictures (box-office)	450-460
Mail Order (all materials)	12-14
Under-the-Counter (all materials)	5-10
Total	537-574

51. American Law Institute, *Model Penal Code*, (Tentative Draft, No. 6), 53 and Proposed Official Draft s.251.4(2)(e).
52. *New York Times*, 11 July, 1971 p. 1 — "Exploitation Spreading Here"; *New York Times*, 12 Feb., 1972, p. 10 — "Denmark Closing Some Sex Shows".
53. *Commission on Obscenity and Pornography*, 142-143.
54. *R.* v. *Prairie Schooner News Ltd & Powers* (1971) 1 C.C.C. (2d) 251 (Man.C.A.).
55. Rembar, *The End of Obscenity*, London, 1968, 509-510.
56. *Report of the Commission on Obscenity and Pornography*, 203 (Table 7).
57. Compare *R.* v. *Sequin* [1969] 2 C.C.C. 150, 156 (Ont.Co.Ct.) with *R.* v. *Marro* (1955) 113 C.C. 297, 302 (Mont.Sess.Ct.).
58. *Walter* v. *Selfe* (1851) 4 De G. & Sm. 315, 326, 64 E.R. 849, 853; *R.* v. *Price* (1884) 12 Q.B.D. 247, 256; *Criminal Code* s.176.
59. *E.g. R.* v. *Grey* (1864) 4 F. & F. 73, 176 E.R. 472 (Herbalist publicly exhibiting in shop window picture of man covered with erruptive sores — guilty of nuisance in exposing offensive and disgusting exhibition); *R.* v. *Clark* (1883) 15 Cox C.C. 171 (exposing mutilated body of infant on public highway — convicted of public nuisance); *R.* v. *Elliott and White* (1861) Le. & Ca. 103, 169 E.R. 1322 (couple

having intercourse on a common held indictable offence in the nature of a public nuisance). See also *R.* v. *Mayling* [1963] 2 W.L.R 703.

60. *Galletly* v. *Laird* [1953] S.C.(J.) 16, 26; *R.* v. *Berringer* (1959) 122 C.C.C. 350, 363 (N.S.S.C.).
61. *New York Times*, 2 Sept., 1971, p. 36 "Pornography Shops Clean Up Windows to Comply With Law".
62. Steiner, "Night Words: High Pornography and Human Privacy", in Hughes (ed.), *Perspectives on Pornography*, New York, 1970, 96.
63. Remark attributed to Mrs. Patrick Campbell, quoted in Kuh, *Foolish Figleaves*, New York, 1967, 269.
64. *R.* v. *Great West News Ltd. Mantell and Mitchell* [1970] 4 C.C.C. 307, 317 (Man.C.A.)
65. *R.* v. *Goldberg & Reitman* [1971] 3 O.R. 323 (Ont.C.A.)
66. (1868) L.R.3 Q.B. 360, 371. See also *R.* v. *St. Clair* (1913) 21 C.C.C. 350 (Ont.C.A.).
67. Frankfurter J. in *Butler* v. *Michigan* (1957) 352 U.S. 380, 383.
68. Tentative Draft No. 6, 1957, 38.
69. *Model Penal Code* (Proposed Official Draft), 1962, s.251.4(1).
70. [1963] 2 C.C.C. 103; 40 C.R. 109.
71. *Dominion News and Gifts (1962) Ltd.* v. *The Queen* [1964] S.C.R. 251, 3 C.C.C.1, 42 C.R. 209.
72. [1963] 2 C.C.C. 103, 116. See also *R.* v. *Adams* [1966] 4 C.C.C. 42, 64-76 (N.S.Co.Ct.); *R.* v. *Cameron* [1966] 4 C.C.C. 273, 303-311 (Ont.C.A.); *R.* v. *Great West News Ltd. Mantell & Mitchell* [1970] 4 C.C.C. 307, 314-315 (Man.C.A.).
73. Herbert, *Uncommon Law*, London, 1935, 4.
74. "Censorship of Obscenity", (1960) 45 *Minnesota Law Review* 5, 78-79.
75. *Commission on Obscenity and Pornography*, 157.
76. Kutchinsky, *Studies on Pornography and Sex Crimes in Denmark*, Copenhagen, 1970, 17.
77. *Commission on Obscenity and Pornography*, 157-163.

CRIMINAL CODE PROVISIONS

> "We believe that we have produced a definition which will be capable of application with speed and certainty, by providing a series of simple objective tests in addition to the somewhat vague subjective test which was the only one formerly available. The test will be: 'Does the publication complained of deal with sex, or sex and one or more of the other subjects named? If so, is this the dominant characteristic? Again if so, does it exploit these subjects in an undue manner?" We have been careful in working out this definition not to produce a net so wide that it sweeps in borderline cases or cases about which there may be genuine difference of opinion. In our efforts we have deliberately stopped short of any attempts to outlaw publications concerning which there may be any contention that they have genuine literary, artistic or scientific merit. These works remain to be dealt with under the Hicklin definition, which is not superseded by the new statutory definition."
>
> Dr. D.E. Fulton, Minister of Justice,
> *House of Commons Debates* (Can.), 1959,
> vol.5, 5517.

The recently renumbered *Criminal Code* (R.S.C. 1970, c.C-34) provisions governing obscenity are: s.159, which creates a series of *in personam* offences in relation to the dissemination of obscene matter[1]; s.160, which permits *in rem* proceedings against obscene publications[2] by allowing for their seizure, forfeiture and disposal; s.161, which prohibits tied sales (*e.g.* distribution of non-obscene publications to shop-keepers on condition that they accept, for sale, other publications which may be obscene); s.163, which prohibits the presentation of or participation in obscene theatrical performances[3]; s.164, which makes it an offence to use the mails for transmitting or delivering anything that is obscene[4]; and s.171(a), which, *inter alia*, provides for the punishment of those causing a disturbance in or near a public place by use of obscene language. Sections 513(1) and 516(1)(d) of the *Code* provide respectively, that though a charge of selling or exhibiting obscene writing is not insufficient by reason only of the fact that the count does not set out the writing alleged to be obscene, the court may order the prosecution to furnish such particulars. By virtue of s.165, offenders against ss. 159, 161, 163, and 164 may be proceeded against by indictment or summarily.[5] Those found guilty on indictment are liable to imprisonment for two years [6] and those convicted summarily are liable to a fine of not more than $500 or imprisonment for six months or both[7]. Section 171 creates only a summary offence. If the Crown exercises its option to proceed by way of indictment, the accused is entitled to a jury trial but may elect to be tried by a magistrate or judge without a jury.[8]

The key obscenity provisions are s.159 (formerly s.150) and s.160 (formerly s.150A), the essential parts of which read:

> **159.** (1) Every one commits an offence who
> (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, . . .
> (2) Every one commits an offence who knowingly, without lawful justification or excuse,
> (a) sells; exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,
> (3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.
> (4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.
> (5) For the purposes of this section the motives of an accused are irrelevant.
> (6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge . . .

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

160. (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, shall issue a warrant under his hand authorizing seizure of copies.

(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be obscene or a crime comic may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is obscene or a crime comic, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is obscene or a crime comic, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired . . .

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, no proceedings shall be instituted or continued in that province under section 159 with respect to those or other copies of the same publication without the consent of the Attorney General . . .

A brief outline of the history of these *Code* provisions is essential to an understanding of the present law.[9] The first Canadian statutory prohibition on obscenity was s.179 of the 1892 *Criminal Code*. That section provided that the public sale, or exposure for sale of any obscene book or printed matter would constitute an indictable offence. The term "obscene" was not defined but, in dealing with obscenity prosecutions, the courts applied the English common law definition of obscenity as enunciated by Lord Chief Justice Cockburn in the 1868 case of *R.* v. *Hicklin*,[10] *viz:*

> "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.[11]

This test was applied in Canadian courts until the introduction, in 1959, of what is now s.159(8)

The *Hicklin* formula has been much criticized.[12] It has been repudiated in the U.S.A.,[13] and modified by statute in England and Australia.[14] Apart from general objections on the grounds that it is vague in meaning and subjective in application, specific complaints are that the test is concerned with the effect of the publication on the most vulnerable individuals in the potential audience, that the tendency of the publication charged as obscene to deprave and corrupt is inferred from an examination of the document itself and that evidence from experts as to the impact of the material is not admissible.[15] No defence of literary or artistic merit is allowed[16] (evidence upon these matters is excluded), a specific intention to deprave and corrupt is either not required or may be inferred from the nature of the publication since it is not necessary for the prosecution to prove that intention by other evidence,[17] and, finally, the practice has developed, in applying the test, of examining isolated passages from the text and not the work as a whole.[18]

A Senate *Special Committee on the Sale and Distribution of Salacious and Indecent Literature* was established in 1952 to consider the question of controlling objectionable literature. The existing legislation, still relying on the *Hicklin* common law definition of obscenity, was defended by the then Minister of Justice who protested that the law was neither vague or uncertain and that the problem was primarily one of enforcement. He stated that no law enforcement agencies had complained that the law was unenforceable and none of those persons who had made the allegation had shown that they had invoked the law and had failed to secure a conviction because of its unenforceability. The Senate Committee did not reach a decision and was not reappointed at the next session of Parliament.[19] In 1958, a study prepared for the Ontario Attorney-General's *Committee on Obscene and Indecent Literature* reported that there was, at that time, definitely no major concern regarding obscene and indecent literature in that province and that a similar position obtained with respect to the other provinces.[20]

In 1959 a Bill was introduced in the Commons to amend the obscenity provisions of the *Code*. The major changes proposed were the addition of the words:

> "For the purpose of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene"

and the introduction of *in rem* proceedings against the book itself without the need to bring a criminal charge against an individual.[21]

It was the clear intention of the Minister of Justice, in proposing the legislation, that the new statutory definition was meant to supplement the *Hicklin* test and was not designed to supplant it.[22] What was aimed at was a double standard of obscenity; that of "undue" exploitation of a theme involving sex to bar items which, even though contrary to public taste, could not have been legally held to be obscene under the *Hicklin* test, and, in reserve, the *Hicklin* rule to deal with "ordinary" obscenity. These amendments, particularly the new definitional clause, were criticized for being difficult to understand, complex and as subjective as the *Hicklin* test, and also for failing to make clear the legislative intention with respect to the continued status of the *Hicklin* definition.[23] The Bill was nevertheless passed and proclaimed. The new legislation has given rise to a number of problems.

1. Is The Hicklin Test Still Applicable?

The first reported cases upon the new provisions accepted that the *Hicklin* test of obscenity and the new formulation could coexist.[24] In *R.* v. *Munster* Chief Justice Isley briefly observed of s.159(8):

> "It does not purport to be a definition of 'obscene'. Matter not included in its provisions may be obscene. And whether such matter is obscene or not is, in my opinion, determined by the test in *R.* v. *Hicklin*. . . . . "[25]

and *R.* v. *Standard News Distributors Inc.*[26] Monty J. contrived to find that the essence of undueness was whether the matter could only tend to deprave and corrupt those whose minds were open to such influences and into whose hands the publication was likely to fall.

In 1959 forfeiture proceedings were brought against D.H. Lawrence's book *Lady Chatterley's Lover.* The matter reached the Supreme Court of Canada in *R.* v. *Brodie, Dansky & Rubin*[27] where, of the nine members of the court who heard the appeal, four held that the *Hicklin* test was excluded under the new legislation, two held that it might apply, and three reserved their opinion in this point. The leading judgement delivered by Judson J. (Abbot and Martland JJ. concurring) expressly disapproved of *R.* v. *Munster* and denied that there was a double standard:

> "If there is to be a double standard, it must be expressly set out in the Code . . . if a result such as this is to be brought about the legislature must define the two standards of obscenity and tell the court that the charge is proved if the work offends either standard."[28]

A series of subsequent cases have treated the statutory definition as being exhaustive,[29] but the Supreme Court has not subsequently had the question before it for reconsideration and the issue cannot be considered completely closed. For instance, s.159(8) deems certain "publications" obscene, but the *Code* elsewhere deals with obscenity which is not in the form of a publication *e.g.* models, phonograph records and theatrical performances. What definition of obscenity applies to such "non-publications" remains an outstanding and unresolved question.[30]

2. What Is The Meaning of the s.159(8) Test?

The meaning of obscenity as derived from the statutory formula of s.159(8) is unsettled. An elaborate interpretive gloss has been building up with each succeeding case and the apparently simple words of the subsection give little guidance as to the manner in which the courts apply the test. Three difficulites exist: (a) What are the constituent elements of the formula? (b) How do the different elements relate to one another? and (c) How is the test applied in practice?[31]

(a) *What Are the Constituent Elements of ths s.159(8) Formula?*

The cases have separated out two major elements "dominant characteristic" and "undue exploitation". Neither the word "characteristic" nor "exploitation" have caused difficulty; the former being accepted as referring to a distinguishing peculiarity or quality, while the latter is taken to have the neutral economic meaning of "turning to account" rather than any strong pejorative tone.[32] So far as the words "dominant" and "undue" are concerned, the principles enunciated by Mr. Justice Judson and his three concurring judges in the Supreme Court hearing of the *Lady Chatterley's Lover* case were that: *1.* A book may have more than

one dominant characteristic. *2.* Whether any one of the *dominant* characteristics of the work is the undue exploitation of sex depends upon: (a) the examination of the work as a whole[33] and not merely isolated passages, (b) the author's purpose, and (c) the literary or artistic merit of the work. *3.* Some exploitation of sexual themes is permitted. *4.* Whether the exploitation is *undue* depends upon: (a) the author's purpose, (b) the literary or artistic merit of the work, and (c) whether the work offends against community standards of decency.

(b) *How do these Different Elements Relate to One Another?*

In a detailed examination of this question one Canadian writer recently commented:

> "In adopting the terms 'purpose', 'merit' and 'community standards' Judson J. substantially increased the size of the already mushy obscenity jargon with the inevitable result that subsequent cases would thoroughly shuffle the terms about. Thus *R.* v. *Cameron* considered that 'merit' was relevant in the determination of 'obscenity' and 'purpose' but only if the subject matter of the work did not *per se* offend 'community standards'; *R.* v. *Frazer* agreed that the whole work in context, as well as *purpose* and *merit* must be considered, to determine a dominant characteristic and undue exploitation however; "in weighing all these considerations there should be taken into account the contemporary and local standards of the community"; *R.* v. *Adams* tried to resolve the possible conflict between . . . merit and community standards test by making community standards the test for merit . . . . O'Hearn Co.Ct.J. found such a resolution unconvincing and concluded, in the reverse, that *merit* and *purpose* were relevant to the determination of community standards. It is safe to say that any one consideration has to be held to be relevant to every other. . . . . "[35]

A closer examination of the criteria "author's purpose", "artistic and literary merit" and "community standards" also serves to deepen the morass of verbiage. The *Brodie* case drew a distinction between base purpose (implying obscenity) and serious purpose (implying non-obscenity). Serious purpose has been interpreted as having something to do with portraying life with "honesty and uprightness",[36] but has also been linked with artistic merit. The *Cameron* case, however, illustrated that serious purpose alone will not avail to save a work that is thought to offend against community standards.[37] Base purpose on the other hand, is to vilify sex and to treat it as something "less than beautiful" or to write in a manner calculated to serve aphrodisiac purposes.[38]

Literary and artistic merit is a factor whose influence on the judgement that a work is obscene is complicated by the fact that it has been held to be relevant, not only to the question, under s.159(8), what is the dominant characteristic of the work and whether the exploitation of sex is undue, but also, under s.159(3), to the issue of whether the "public good" has been served. Moreover the courts have, understandably, no formula for literary or artistic merit and rely heavily on expert evidence in this regard. On occasion, however, they refer to the "internal necessities" of the work as a measure of its merit in holding that exploitation may be undue if the writer goes beyond what the theme requires.[39] But this tends to place judges in the strange position of having to become literary critics whose duties include instructing authors how to write their books after they have been written.

Offence to community standards of decency is the key variable in the Supreme Court's interpretation of the meaning of obscene, in s.159(8). Indeed, so over-riding has become this factor, that the present Canadian test of obscenity might well be described as the "community standards" test. The basis of the reference to "community standards" as a measure of the extent to which exploitation is undue is a series of Australian and New-Zealand obscenity decisions dealing with the phrase "undue emphasis".[40] The proposition found in these cases is that unduly emphasising matters of sex means dealing with them in a manner which offends against the standards of the community in which the article is published, distributed, etc. In *Brodie's* case Judson J. in delivering the majority judgement declared:

> "Surely the choice of courses is clear cut. Either the Judge instructs himself or the jury that undueness is to be measured by his or their personal opinion and even that must be subject to some influence from contemporary standards — or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two, I think the second is the better choice."[41]

Shortly afterwards, in *R.* v. *Dominion News and Gifts Ltd.*[42], the Manitoba Court of Appeal was called upon to determine whether the dominant characteristic of two magazines for men was the undue exploitation of sex within the meaning of the *Code*. In a dissenting judgement which was subsequently unreservedly approved and commended by the Supreme Court,[43] Freedman J. offered the following delineation of community standards: Firstly, the mere numerical support which a publication was able to attract was not to be determin-

ative of the issue whether the work was obscene or not, since a sufficiently pornographic publication would be bound to appeal to hundreds or thousands of prurient, lascivious, ignorant, simple or merely curious readers. Large readership was not the main test although it might be taken into account in ascertaining or attempting to identify the standards of the community in relation to obscene publications:

> "The standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste or habit of mind. Something approaching a general average of thinking and feeling has to be discovered."[44]

Secondly, he declared that the community standards applied must be contemporary and that recognition must be made of the changing times and ideas and the increased liberalization and relative freedom with which the whole question of sex is discussed. Thirdly, the community standards applied must be local regardless of attitudes which might prevail elsewhere, whether they be more or less liberal. His Honor's use of the word "local" was unfortunate, for it is obvious from his judgement that he had national, rather than provincial, metropolitan or rural standards in mind and that he was merely seeking to forestall attempts to introduce evidence of United States' tolerance of the publications. Subsequent decisions have, however, confirmed that the standard to be applied is a national one.[45] How such standards are to be ascertained will be discussed at a later stage.

The manner in which the constituent elements of s.159(8) are legally inter-related remains open and uncertain. One valiant attempt to untangle the web produced the following equation:

> "Base purpose, lack of merit and an offence against community standards count individually towards a finding of obscenity while serious purpose, artistic merit and a non-offence against community standards do not individually count away from a finding of obscenity unless all three point away."[46]

But when a trial judge directed a jury in precisely these terms, the Ontario Court of Appeal held it to be a misdirection and ruled that a correct charge to the jury would have been to put to them the three factors of purpose, merit, and community standards without reference to weight or relationship.[47]

(c) *How is the Test Applied in Practice?*

An examination of the actual decisions in the reported cases leads to the conclusion that the application of s.159(8) leaves much to be desired and that the real reasons for the decisions are not to be found in the formula:

> " . . . the formula discussed and developed in the abstract, and occupying the greatest part of the obscenity decisions, has never been satisfactorily applied to the facts but is applied only by way of salutatory genuflexion, usually to the concealment of whatever real reason the tribunal may have had for its decision . . . Every reported obscenity judgement without exception is confident and resolute even when forming part of the minority. When one considers the number of unanimous decisions reversed on appeal and the very slim deciding majority that has made so much of our law of obscenity, serious questions arise as to what law individual judges were applying to the facts or, more basically, as to what factors were that each judge saw."[48]

When translated into operational terms, the test of obscenity, as interpreted by Canadian courts, may be little more than, "Does the publication shock the judge?" If it does, it will be interpreted as being in conflict with community standards, unredeemed by purpose or merit, and the causal link between the publication and the social dangers feared will be assumed. This is a far cry from the confident assertion of the Minister of Justice in 1959 that he had produced a definition "which will be capable of application with speed and certainty, by providing a series of simple and objective tests in addition to the somewhat vague subjective test which was the only one formerly available".

3. Knowledge and Intention

It is to be noted that the omission of the word "knowingly" from s.159(8) and the provision of sub-section (6) make it unnecessary for the Crown to prove, in the case of a charge under s.159(8),that the accused knew that the matter in question was obscene. Under s.159(2), however, the Crown must prove that the offence was committed knowingly and without justification or excuse. The statute does not explain the reason for the presence of "knowingly" in sub-section (2) and its absence in sub-section (1) though it has been suggested, so far as s.159(2)(a) is concerned, that the difference exists to protect the innocent retail store proprietors who "sell" and "expose to view" large quantities of magazines and newspapers the contents of which

they cannot reasonably be expected to have read.[49] Certainly the cases indicate that inclusion of "knowingi, requires the Crown to establish, beyond reasonable doubt, that the accused was aware of the character of the material published and that it was sold or exposed for public view with his knowledge.[50]

This suggestion that the presence of "knowingly" in sub-section (2) is intended to protect a certain class of innocent disseminator does not ring true since the same protection is offered to persons who offend against other sub-sections, namely s.159(2)(b), (c) and (d). It is more logical to view the *ommission* of "knowingly" from s.159(1), and the addition of sub-section (6), as an attempt to make it easier to prosecute the manufacturers and commercial disseminators of obscenity by relieving the Crown of its obligation to prove the elements of knowledge. It is, in fact, an attempt to turn the offences of making, printing, publishing, distributing or circulating obscene matter, or possessing obscene matter for such purposes, into offences of strict liability.

Whether the *Criminal Code* should contain offences of strict liability is a question which should be settled as a matter of general principle rather than on an offence by offence basis. Any advantages to the prosecution may well be set off by the sense of arbitrariness and injustice which is generated when defendants are denied the usual grounds of exculpation, *e.g.* lack of requisite intent, knowledge, etc. No case can be made out for abrogating the general principles of the criminal law in relation to one, poorly identified group of possible offenders[51] while allowing another group full protection. To require *mens rea* in all cases would be consistent with principle and would do less violence to the overall logic of defining criminal offences in terms of both act and intent. It is true that such a change would increase the evidentiary burden on the prosecution, but this is not unduly onerous for the requisite knowledge may, in the absence of evidence to the contrary, be inferred from proof that the accused had full control over what was or was not to be published.[51] While honest ignorance will provide a defence, wilful blindness or recklessness will not.[53]

4. Relationship Between s.159 and s.160

Whereas s.159 sets out a series of offences for which individuals may be prosecuted, s.160, which like s.159 was added in 1959, provides only for *in rem* proceedings against the publication itself. The principal sub-section reads:

> "A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene . . . shall issue a warrant under his hand authorizing seizure of the copies."

This section is based upon the English *Obscene Publications Act* 1857 (Lord Campbell's Act)[54] but contains two important provisions which were not found in that Act. The first is that the *author* as well as the owner of the publication may appear and be represented in proceedings to show cause why the matter seized should not be forfeited to the Crown (s.160(3)). The second is that once an order for forfeiture has been made under s.160, no proceedings can be brought under s.159 in relation to the same publication except with the consent of the Attorney-General. This is intended to minimize the risk of double jeopardy. The courts have supervised proceedings under s.160 with some strictness and if the particulars in the warrant are insufficiently specific, the warrant may be quashed.[55]

The issuance of the warrant requires that the judge be satisfied that there are reasonable grounds for believing that copies of obscene publications are being kept for sale or distribution. The order to forfeit or restore the publications requires only that the court be "satisfied" of their obscenity or otherwise. The question of the onus and standard of proof required in this context is complicated by the fact that s.160(2) compels the occupier of the premises from which the matter was seized to appear before the court and show cause why it should not be forfeited. It would accord with principle if the word "satisfied" was amended to read "satisfied beyond all reasonable doubt" and thus made it clear that the onus of proof still rests squarely upon the Crown.[56]

In rem proceedings, which are concerned with the publication itself rather than with the conduct of an individual offender, are predicated upon obscenity being seen as inherent quality in certain subject matter irrespective of the context in which it is disseminated. The aim of the s.160 procedure is to prevent certain matter from being disseminated at all, and it is no answer to say that the material was intended to be disseminated to a voluntary adult audience immune to the harm thought to flow from exposure to such publications. The assumptions or values underlying s.160 are that commercial exploitation of sexually explicit material should be prevented, that obscenity inheres in certain identifiable subject matter, and that the courts should be given power to circumvent the possibility of any dissemination and profit-making by confiscation and forfeiture.

5. Conspiracy

Section 423(1)(d) of the *Code* makes it an offence to conspire with anyone to commit an indictable offence and s.423(2)(a) maintains the offence of common law conspiracy. The significance of these provisions is two-fold. Under s.423(1)(d) a charge of conspiring to commit an indictable offence of distributing obscene matter may be laid and, as was demonstrated in the English case of *R.* v. *Clayton and Halsey*,[57] may operate to by-pass any safeguards contained in the obscenity legislation, because the charge is conspiracy and not obscenity. Section 423(2)(a) leaves open the possibility that, even if the *Code* provisions on obscenity are significantly modified, charges in relation to conspiracy to corrupt public morals (as in *D.P.P.* v. *Shaw*)[58] and conspiracy to outrage public decency (as in *R.* v. *Knuller*)[59] could be effectively used to punish the disseminators of sexually explicit material.

6. Private Possession

Unless the matter happens to be prohibited import under item 99201-1 of schedule C of the *Customs Tariff Act* (see discussion below under heading 'Other Federal Legislation'), private possession alone of obscene material is not an offence under Canadian law.

Section 159(1)(a) renders possession for the purpose of publication, distribution or circulation an offence, while s.159(2)(a) punishes possession for the purpose of selling or exposing to public view. But possession *simpliciter* is not prohibited. In 1961, Wilson J. of Supreme Court of British Columbia held that the private non-commercial presentation of an obscene film to friends and guests by a person in his own home did not constitute the offence of possessing obscene matter for the purpose of "publication"[60] and, recently, the Supreme Court of Canada held that a similar showing was also not possession for the purpose of "circulation".[61]

REFERENCES

1. The section also includes prohibitions on the dissemination of crime comics, the public exhibition of disgusting objects or indecent shows, the sale or advertisement of abortifacients, and the advertisement of methods of restoring sexual virility or curing veneral diseases. Section 162(1)(a) punishes proprietors, editors, printers and publishers who print, in relation to judicial proceedings, any indecent matter or indecent medical, surgical or physiological details which, if published, are calculated to injure public morals. The prohibition does not extend, specifically, to obscene material.
2. The section also permits seizure and forfeiture of crime comics.
3. The section also extends the prohibition to immoral or indecent performances. See *R.* v. *Jourdan* (1904) 8 C.C.C. 337 (Mont.Rec. Ct.); *R.* v. *McAuliffe* (1904) 8 C.C.C. 21 (N.S.Co.Ct.); *Conway* v. *R.* (1943) 81 C.C.C. 189 (Que.K.B.); *R.* v. *Marro* (1955) 113 C.C.C. 297 (Mont.Sess.Ct.); *Smith* v. *R.* [1963] 1 C.C.C. 395 (Man.Co.Ct.); *R.* v. *Sequin* [1969] 2 C.C.C. 150 (Ont.Co.Ct.).
4. Or, indecent, immoral or scurrilous. See *R.* v. *Lambert* (1965) 47 C.R. 12 (B.C.S.C.).
5. The validity of such discretionary power in the Crown is established by *Smythe* v. *R.* (1971) 3 C.C.C. (2d) 366, 16 C.R. 147 (S.C.C.).
6. *Code*, s.165(a). A fine may be imposed in addition to, or in substitution of the term of imprisonment: *Code* s.646.
7. *Code*, s.722.
8. *Code*, s.484.
9. For a detailed examination of the background see Charles, "Obscene Literature and the Legal Process in Canada", (1966) 44 *Canadian Bar Review* 243 and the judgement of Laidlaw J.A. in *R.* v. *American News Co. Ltd.* (1957) 118 C.C.C. 152, 162-164.
10. (1868) L.R.3Q.B. 360.
11. *Ibid.*, 371. Reported Canadian cases until 1959, in which the *Hicklin* test was applied to publications are: *R.* v. *Beaver* (1904) 9 C.C.C. 415 (Ont.C.A.); *R.* v. *MacDougall* (1909) 15 C.C.C. 466 (N.B.S.C.); *R.* v. *St. Clair* (1913) 21 C.C.C. 350 (Ont.C.A.); *R.* v. *National News Co. Ltd.* (1953) 106 C.C.C. 26 (Ont.C.A.); *R.* v. *Hellier* (1953) 106 C.C.C. 145 (B.C.C.A.); and *R.* v. *American News Co. Ltd.* (1957) 118 C.C.C. 152 (Ont.C.A.). The test was also utilized in relation to theatrical performances in: *R.* v. *McAuliffe* (1904) 8 C.C.C. 21 (N.S.Co.Ct.); *R.* v. *Jourdan* (1904) 8 C.C.C. 337 (Mont.Rec.Ct.) and *R.* v. *Conway* (1943) 81 C.C.C. 189 (Que.K.B.).
12. For Canadian criticism see MacKay, "The Hicklin Rule and Judicial Censorship", (1958) 36 *Canadian Bar Review* 1; Edmonson & Wright "Canadian Obscenity Law — Archaic Trends", (1958) 16 *University of Toronto, Faculty of Law Review* 93; Welbourn, "Censorship and the Law in Canada", (1959) 29 *Saskatchewan Bar Review* 29; Charles, "Obscene Literature and the Legal Process in Canada", (1966) 44 *Canadian Bar Review* 243.
13. *U.S.* v. *One Book Entitled Ulysses* (1934) 72 F.2d 705 (U.S. Circuit C.A.).
14. England — *Obscene Publications Act*, 1959, as amended by *Obscene Publications Act*, 1964; Australia — Victoria: *Police Offenses Act*, 1958. Part V; New South Wales: *Obscene and Indecent Publications Act*, 1901-1955; see generally Fox, *The Concept of Obscenity*, Melbourne, 1967.
15. *R.* v. *Reiter* [1954] 2 Q.B. 16; *Thompson* v. *Chain Libraries Ltd.* [1954] 1 W.L.R. 999; *R.* v. *Anderson & Ors* [1971] 3 W.L.R. 939 (C.A.).
16. However, s.179(3) of the 1892 *Criminal Code* provided that: "No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done." See now *Code* s.159(3).

17. See Laidlaw J.A. in *R.* v. *American News Co. Ltd.* (1957) 118 C.C.C. 152, 161 and Fullagar J. in *R.* v. *Close* [1948] V.L.R. 445, 462. The proposition is, however, not good law: Fox, *The Concept of Obscenity*, Melbourne, 1967, 100-106.
18. *E.g.* in *Paget Publications Ltd.* v. *Watson* [1952] 1 All E.R. 1256 the Court of Appeal upheld a magistrate's ruling that an entire publication should be destroyed as obscene even though only the illustrations on the inside covers were objectionable.
19. See Charles, *op. cit.* 250-252. The Minister's position found support in figures relating to prosecutions and convictions under the obscenity section of the *Code* in 1950-52 which indicated relatively few prosecutions but a high percentage of convictions:

Year	No. Prosecutions	% Convictions
1950	33	91
1951	31	90
1952	30	96

(House of Commons Debates (Can.), 1953 vol. 2, 1852)

20. Mohr, *Report on a Study of Obscene and Indecent Literature*, Toronto 1958, 48 & 51-52. See also *Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada*, Ottawa, 1957, 32.
21. Now s.160. The section was based upon Lord Campbell's 1857 *Obscene Publications Act*, 20 & 21 Vict. c.83 (Eng.).
22. *House of Commons Debates* (Can.), 1959, vol. 5, 5517 & 5542.
23. Charles, *op. cit.* 253-256.
24. *R.* v. *Munster* (1960) 129 C.C.C. 277 (N.S.C.A.); *R.* v. *Standard News Distributors Inc.* (1960) 34 C.R. 54 (Mont.Mun.Ct.).
25. *R.* v. *Munster* (1960) 129 C.C.C. 277, 279.
26. (1960) 34 C.R. 54 (Mont.Mun.Ct.).
27. (1962) 132 C.C.C. 161.
28. *Ibid.*, 178. Judson J. added that this was the manner in which the Australian and New-Zealand legislation was framed.
29. *R. ex rel. Rose* v. *Marshall* (1962) 48 M.P.R. 64 (Nfld.Dist.Ct.); *R.* v. *Modenese* (1962) 38 C.R. 45 (B.C.Mag.Ct.); *Re Gordon Magazine Enterprises Ltd.* (1965) 46 C.R. 313 (Ont.C.A.); *R.* v. *Coles Co. Ltd* [1965] 2 C.C.C. 304 (Ont.C.A.); *R.* v. *Lambert* (1965) 46 C.R. 12 (B.C.S.C.); *R.* v. *Cameron* (1966) 4 C.C.C. 273 (Ont.C.A.); *R.* v. *Frazer* [1966] 1 C.C.C. 110 (B.C.C.A.) *R.* v. *Georgia Straight Publishing Ltd. & McLeod* [1970] 5 C.C.C. 31 (B.C.Co.Ct.). But *cf. R.* v. *Adams* [1966] 4 C.C.C. 42 (N.S.Co.Ct.) and *R.* v. *Huot* (1968) 70 D.L.R. (2d) 703 (Man.C.A.).
30. This point was raised but not resolved in *R.* v. *Lambert* (1965) 47 C.R. 12, 15 (B.C.S.C.); and *R.* v. *Sequin* [1969] 2 C.C.C. 150 (Ont.Co. Ct.). Mention was, however, made in both cases of the possibility of applying the *Hicklin* test. As to the meaning of "publication" in this context see *Re R.* v. *Adams* [1969] 2 C.C.C. 21 (N.S.Co.Ct.), *R.* v. *Frazer* [1966] 1 C.C.C. 110, 120-121 & 132 (B.C.C.A.).
31. See generally, Barnett, "Obscenity and s.150(8) of the Criminal Code", (1969) 12 *Criminal Law Quarterly* 10.
32. *R.* v. *Prairie Schooner News Ltd. & Powers* (1971) 1 C.C.C. (2d) 251, 262 & 268 (Man.C.A.).
33. See *R.* v. *Brodie* (1962) 132 C.C.C. 161, 179; *R.* v. *Georgia Straight Publishing Ltd. & McLeod* [1970] 5 C.C.C. 31. But *cf. R.* v. *Anderson & Ors* [1971] 3 All E.R. 1152 (C.A.).
34. *R.* v. *Brodie, Dansky & Rubin* (1962) 132 C.C.C. 161, 179-182.
35. Barnett, *op. cit.*, 12-13.
36. (1962) 132 C.C.C. 161, 181.
37. [1966] 4 C.C.C. 273 (Ont.C.A.).
38. *R.* v. *Duthie* [1967] 1 C.C.C. 254, 261 (B.C.C.A.).
39. *R.* v. *Brodie* (1962) 132 C.C.C. 161, 181 but note the comments of Laskin J. in *R.* v. *Cameron* [1966] 4 C.C.C. 273, 306-307.
40. *R.* v. *Close* [1948] V.L.R. 448 (Vict.Sup.Ct.); *Wavish* v. *Associate Newspapers* [1959] V.R. 57 (Vict.Sup.Ct.); *In re Lolita* [1961] N.Z. L.R. 542 (N.Z.C.A.); *R.* v. *Neville* (1966) 83 W.N. (N.S.W.) 501 (N.S.W.C.C.A.).
41. *R.* v. *Brodie* (1962) 132 C.C.C. 161, 183.
42. [1963] 2 C.C.C. 103.
43. *Dominion News & Gifts Ltd.* v. *R.* (1964) 3 C.C.C. 1.
44. [1963] 2 C.C.C. 103, 116.
45. *R.* v. *Adams* [1966] 4 C.C.C. 42 (N.S.Co.Ct.); *R.* v. *Cameron* [1966] 4 C.C.C. 273 (Ont.C.A.); *R.* v. *Duthie Books* [1967] 1 C.C.C. 254 (B.C.C.A.); *R.* v. *Great West News Ltd., Mantell & Mitchell* [1970] 4 C.C.C. 307 (Man.C.A.); *R.* v. *Goldberg & Reitman* [1971] 3 O.R. 323 (Ont.C.A.).
46. Barnett, *op. cit.*, 20.
47. *R.* v. *Times Square Cinema Ltd.* (1971) 4 C.C.C. (2d) 229 (Ont.C.A.).
48. Barnett, *op. cit.*, 27 & 28.
49. See Practice Note to *R.* v. *Harte-Maxwell* (1962) 39 C.R. 172 (Ont.Co.Ct.).
50. *R.* v. *Beaver* (1904) 9 C.C.C. 415 (Ont.C.A.); *R.* v. *MacDougall* (1909) 15 C.C.C. 466 (N.B.S.C.); *R.* v. *Britnell* (1912) 20 C.C.C. 85 (Ont. C.A.); *R.* v. *American News Co. Ltd.* (1941) 76 C.C.C. 151 (Ont.Co.Ct.); *R.* v. *National News Co. Ltd.* (1953) 106 C.C.C. 26 (Ont. C.A.); *R. ex rel. Burns* v. *Menkin* (1957) 118 C.C.C. 306 (Ont.Mag.Ct.); *R.* v. *Cameron* [1966] 4 C.C.C. 273 (Ont.C.A.); *Fraser* v. *R.* (1967) 2 C.C.C. 43 (S.C.C.).
51. On its face s.159(1)(a) does not cover retail sellers but only those responsible for the making, distributing or circulation of obscene material. Sellers are caught by s.159(2)(a). However, in *Frazer* v. *R.*, *ibid.*, the Supreme Court of Canada indicated that in certain circumstances the proprietor of a retail book shop may be liable to conviction under s.159(1)(a) in relation to books found on the shelves of the shop. See also *R.* v. *Yip Men* [1970] 4 C.C.C. 185 (B.C.Co.Ct.) and *R.* v. *Dorosz* [1971] 3 O.R. 368 (Ont.C.A.).
52. *R.* v. *Macdougall* (1909) 15 C.C.C. 466 (N.B.S.C.).
53. *R. ex rel. Burns* v. *Menkin* (1957) 118 C.C.C. 306 (Ont.Mag.Ct.); *R.* v. *Lee* [1971] 3 C.C.C. (2d) 306 (B.C.S.C.).
54. 20 & 21 Vict. c. 83.
55. *Mueller* v. *McDonald, Cowan and A-G for Saskatchewan* (1962) 133 C.C.C. 183 (Sask.Q.B.); *Re. R. and Adams* (1969) 2 C.C.C. 21 (N.S.Co.Ct.). See also Vamplew, "Obscene Literature and Section 150A", (1964) 7 *Criminal Law Quarterly* 187.
56. See *R.* v. *Dominion News & Gifts Ltd.* [1963] 2 C.C.C. 103, 115 per Freedman J.

57. [1962] 3 All E.R. 500 (C.C.A.). In Canada, for such an attempt, see: *R.* v. *McAuslane & Ors* (1972) 5 C.C.C. (2d) 54 (Ont.C.A.).
58. [1962] A.C. 220 (H.L.). Mewett, "Morality and the Criminal Law", (1962) 14 *University of Toronto Law Journal* 213, 220 argues that *D.P.P.* v. *Shaw* is not good law in Canada. Even if maintained, his argument is based upon considerations that are not applicable in the case of conspiracy to outrage public decency.
59. [1971] 3 All E.R. 314 (C.A.).
60. *R.* v. *Leong* (1961) 132 C.C.C. 273 (B.C.S.C.).
61. *R.* v. *Rioux* (1970) 3 C.C.C. 149 (S.C.C.). Compare *R.* v. *Berringer* (1959) 122 C.C.C. 350 (N.S.S.C.) and *R.* v. *Piddington* (1958) 122 C.C.C. 265 (B.C.C.A.). In the U.S.A. in *Stanley* v. *Georgia* (1969) 394 U.S. 557, 568 the U.S. Supreme Court held that "the First and Fourteenth amendments prohibit making mere private possession of obscene material a crime."

OTHER FEDERAL LEGISLATION

"I really think that we are much better qualified to deal with increasing the seasonal tariff on cabbages and cucumbers than to pass moral judgement on literature coming into the country."

Mr. G.C. Nowlan, Minister of National Revenue, *House of Common Debates* (Can.), 1958, vol. 4, 4177.

1. Postal

The Criminal Code Proscription, under s.164 of the use of the mails for the purpose of transmitting anything that is obscene is supplemented by general power under s.7 of the *Post Office Act*[1] to restrict the mailing privileges of those who make unlawful use of the mails, *viz*:

> "Whenever the Postmaster General believes on reasonable grounds that any person
> (a) is by means of the mails,
> (i) committing or attempting to commit an offence
> (ii) aiding, counselling or procuring any person to commit an offence, or
> (b) with the intent to commit an offence, is using the mails for the purpose of accomplishing his object,
> The Postmaster General may make an interim order . . . prohibiting the delivery of all mail directed to that person . . . or deposited by that person in a post office."

This power is clearly not restricted to cases in which the source of the unlawfulness is the dissemination of obscenity. There is provision for appeal from such prohibitory orders to a Board of Review but the Board's decision is only advisory and the ultimate power remains vested in the Postmaster General. There is no express provision under Canadian law for citizens to protect themselves against receipt of unwanted or sexually offensive mail and the Canadian Post Office has not become involved in the investigation and censorship of obscenity to the same degree as has the U.S. Postal Service.[2] Post Office officials have limited rights to open mail and the bulk of complaints and suspected materials is handled, after local investigation, through the Post Office Department in Ottawa in conjunction with the Customs and Justice Department. Ordinarily, in the case of isolated complaints, the recipient of offensive mail is advised to complain to the sender. Only mass or repeated mailings of objectionable matter evokes official intervention but the Post Office does circulate to its officers an extensive list of addresses, mainly foreign, in relation to which prohibitory orders exist. (See Appendix A).

2. Customs

Section 14 of the *Customs Tariff Act*[3] empowers the Crown to seize, destroy, or otherwise deal with goods whose importation is prohibited under Schedule C of the Act. Item 99201-1 of Schedule C identifies amongst the categories of prohibited goods:

> "Books, printed matter, drawings, paintings, prints, photographs or representations of any kind of a treasonable or seditious, or of an immoral or indecent character."

In 1970, 4,461 importations were prohibited on the grounds that they were of an immoral or indecent character.[4] As with the post office, local officials serve an investigative and enforcement role but questionable material is referred to Ottawa for decision. In a Tariff Board decision relating to the novel "Peyton Place" criminal cases on obscenity were referred to the *Hicklin* test applied in reversing the ruling of the Deputy Minister of Customs that the book be prohibited entry into Canada on the grounds of its indecency and immorality.[5] Appeals from the Deputy Minister have now been transferred to the Courts in relation to 99201-1 items.[6] The Customs Department attempts to follow the criminal *Code* obscenity cases in setting standards for admission of sexually explicit material. (See Appendix B).

It is no answer to a charge of obscenity under the *Criminal code* to point to the fact that the importation of the publication in question was not prohibited by the Customs Department. Firstly, the phrase "of an im-

moral or indecent character" in 99201-1 of Schedule C is not the equivalent of "obscene" in the *Code*, and, secondly, permission to import is insufficient to give rise to a defence of mistake of fact as to the character of the matter imported. It may, however, be relevant to mitigation of penalty.[7]

3. Radio and Television

The *Broadcasting Act*[8] establishes a Canadian Radio-Television Commission which is charged with the responsibility for implementing the broadcasting policy set down in s.3 of the Act. This policy includes an affirmation that the right to freedom of expression and the right of persons to receive programmes is unquestioned "subject only to the generally applicable statutes and regulations". The Commission is empowered to make regulations respecting standards of programmes[9] and pursuant to this power has prohibited the broadcasting of obscene, indecent or profane language.[10] The Commission's primary sanction is the suspension or revocation of broadcasting licences.

4. Trade Marks Act

Section 9(1)(j) of the *Trade Marks Act*[11] prohibits the adoption in connection with a business, as a trade mark or otherwise, of any "scandalous, obscene or immoral word or device" or anything that is a close resemblance.

5. Bill of Rights

The decision of the Supreme Court in *R.* v. *Drybones*[12] indicated that the Canadian *Bill of Rights*[13] might become a more potent guide to legislative interpretation than had hitherto been recognized. The Bill in s.1(d) and (f) contains express reference to freedom of speech and freedom of the press[14] and although the Canadian Act does not enjoy the same constitutional status as the United States first amendment,[15] the courts have, on numerous occasions, paid at least lip service to the proposition that freedom of expression is a respected value in Canadian society.[16] However, on each occasion the courts have been directly confronted with the *Bill of Rights* freedom of speech argument, they have rejected it. In the lower court hearing in the *Lady Chatterley's Lover* case Larouche J. declared:

> "L'appelant a fait grand état du droit a la liberté d'expression, invoquant à cette fin la Declaration Canadienne des Droits. Je mer permettrai de rappeler sur ce point que si les paragraphes (d) et (f) de l'article 1 de cette loi garantissent les droits fondamentaux à la liberté de parole et de presse, il faut toutefois reconnaître que le Parlement n'a pas entendu pour autant accorder une liberté illimitée qui ne tienne compte d'aucune norme. Il a pris soin de bien préciser dans le 2e alinéa du preambule:
>
> 'Que les hommes et les institutions ne demeurent libres que dans la mesure où la liberté s'inspire *du respect des valeurs morales et spirituelles* et du règne du droit.'
> Or, une oeuvre, dont la tendance est justement de dépraver et de corrompre les moeurs, ne respecte plus les 'valeurs morales' proclamées par la Declaration Canadienne des Droits."[17]

In *R.* v. *McLeod*[18] a case involving a newspaper article which encouraged the planting of marijuana contrary to s.6 of the *Narcotic Control Act*, the British Columbia Court of Appeal denied that upholding the conviction would involve an interference with the "freedom of the press" as expressed in the *Bill of Rights*. Referring to its earlier judgement in *Koss* v. *Konn*,[19] which held that a section of the *Trade Unions Act* did not infringe "freedom of speech", the court again quoted the words of Lord Wright in *James* v. *Commonwealth of Australia*:[20]

> "'Free' is itself vague and indeterminate. . . . Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law."

And, similarly, in *R.* v. *Prairie Schooner News Ltd. & Powers*[21] Justices Dickson and Monnin of the Manitoba Court of Appeal rejected the argument that freedom of speech guaranteed by the Canadian *Bill of Rights* includes freedom to read whatever one desires:

> "Freedom of speech is not unfettered either in criminal law or civil law. The Canadian *Bill of Rights* was intended to protect, and does protect, basic freedoms of vital importance to all Canadians. It does not serve as a shield behind which obscene matter may be disseminated without concern for criminal consequences. The interdiction of the publications which are the subject of the present charges in no way trenches upon the freedom of expression which the Canadian *Bill of Rights* assures."

The argument that "freedom of speech" does not really mean freedom of speech, but must be read subject to existing legal restraints on free expression is an illogical use of words, though an understandable policy compromise. United States Supreme Court decisions have taken the position that obscenity is beyond the pale of the first amendment protection for speech because it is "utterly without redeeming social importance",[22] but this is no less illogical since it is predicated upon two untenable subsidiary propositions, namely, that something which generates sexual interest is of no social value, and that the courts' own involvement in assessing the matter in no way invests it with importance (not even importance from a historical or judicial point of view).

Though the point has not yet been discussed in the context of an obscenity case, perhaps the greatest limitation on a successful appeal to the protection of the *Bill of Rights* is the wording of the first part of s.1 which recognises and declares that in Canada there have existed and shall continue to exist "*without discrimination by reason of race, national origin, colour, religion or sex* the following human rights and fundamental freedoms namely: . . . (d) freedom of speech; . . . (f) freedom of the press." It follows from the words "without discrimination" that the fundamental freedoms set out were not meant to be interpreted as absolute freedoms devoid of control.[23] Indeed, on the contrary, it appears that if the "fundamental freedoms" are abridged or even totally abrogated, s.1 of the *Bill of Rights* would not be violated, provided the abrogation occurs without discriminating between those to be affected on grounds of race, national origin, colour, religion or sex. The American Constitutional guarantees are not so limited and, accordingly, United States analogies are of questionable value in considering the likely impact of the Canadian *Bill of Rights* on the future of the law relating to obscenity.

6. Relationship Between Federal and Provincial Legislation

The federal government has not expressly enacted legislation relating to censorship of films or printed material although it is arguable that by virtue of the *Code* and *Customs Tariff Act* prohibitions, it has already entered the field. Nine of the ten provinces have passed legislation providing for film censorship and/or classification[24] and three have asserted similar powers in respect of written publications.[25]

The question is whether such legislation is within the exclusive legislative competence of the provinces? The issue is important in considering the alternatives available to federal legislators contemplating varying anti-obscenity law. Can censorship procedures more elaborate than the simple prohibitions currently found in the *Code*, to be enacted under the criminal law power? Or does censorship by way of prior restraint fall only within the provinces' enumerated heads of power?

In *A-G for Ontario* v. *Koynok*[26] Mr. Justice Kelly ruled that the protection of public morals was not a matter of local or private nature for the provinces under s.92(13) of the *British North America Act* and the comments of the members of the Supreme Court in the case of *A-G of British Columbia* v. *Smith,*[27] in which the *Juvenile Delinquents Act* was characterized as criminal legislation, discloses generous judicial interpretation of the possible outer limits of Federal criminal law power.

Most recently a Quebec Superior Court ruled that the censorship sections of the *Quebec Publi-cations and Public Morals Act* 1964 were *ultra vires* on the ground that they fell neither under *B.N.A. Act* s.92(13) (provincial property and civil rights) nor under s.92(16) (matters of a purely local and private nature), but constituted a usurpation of the exclusive federal criminal law power under s.91(27).[28] Mr. Justice Batshaw distinguished the cases dealing with the similarity between provincial highway traffic legislation and s.233 of the *Code* (formerly s.221) on the ground that the provincial and federal legislation had been enacted for different purposes. But in relation to the impugned legislation before him he saw no such distinction:

> "[B]oth statutes by title and definition deal with the same subject matter, namely the corruption of public morals by obscene illustrations, in terms which are virtually identical. . . . It is extremely difficult, therefore, to recognize a valid difference in object, purpose, or 'pith and substance' between the two enactments. . . . On the contrary, it seems rather an attempt to use the property and civil rights head of section 92 as a ground for justifying an unwarranted intrusion into the field of criminal law. Similar attempts have been struck down by the Supreme Court as colourable legislation in more than one instance."[29]

The decisions emphasise the exclusiveness of the federal power to punish breaches of public morality and strongly indicate that censorship by way of prior restraint is possible under the *Criminal Code*. It is, perhaps, merely coincidental that some of the provinces have restructured their film censorship legislation to emphasise theatre licencing and film classification rather than censorship functions. It should also be noted, in passing, that the fact that a film has been passed by provincial censorship authorities is no answer to a prosecution for obscenity under the *Code*.

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22. *U.S.* v. *Roth* (1957) 354 U.S. 476, 484; *Memoirs* v. *Massachusetts* (1966) 383 U.S. 413, 418.
23. *R.* v. *Smythe* [1971] 2 O.R. 209, 228-229 per Wells C.J.; *R.* v. *Viens* (1970) 10 C.R.N.S. 363 (Ont.Prov.Ct.); *R.* v. *Lavoie* (1971) 2 C.C.C. (2d) 185 (B.C.Co.Ct.); *R.* v. *Beaulne* (1971) 2 C.C.C. (2d) 196 (Ont.H.C.).
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25. Quebec: *Publications & Public Morals Act*, R.S.Q. 1964, c. 50 deals with provincial censorship of written publications; Saskatchewan: *Queen's Bench Act*, R.S.S. 1965, c. 73, s.42 provides that action may be brought by or on behalf of the Attorney-General restraining publication of obscene matter. A similar provision exists in Ontario's *Judicature Act*, R.S.O. 1970, c. 228, s.19(2). (This latter provision was held to be *ultra vires* in *A-G for Ontario* v. *Koynok* (1940) 75 C.C.C. 100 (Ont.S.C.). The Crown appealed and the matter was disposed of without further discussion of the constitutional point: (1940) 75 C.C.C. 405).

    Two provinces, Alberta and Ontario, have official "advisory" bodies which have no legal power to prevent the sale of a publication in the province but attempt to negotiate with publishers and distributors for the withdrawal from circulation of material regarded as objectionable. In Ontario the body is the *Attorney General's Committee on Obscene Literature*, and in Alberta it is the *Advisory Board on Objectionable Publications.* Neither body has received the cooperation it would like from distributors of the more explicit material.
26. (1940) 75 C.C.C. 100 (Ont.S.C.).
27. [1969] 1 C.C.C. 244 (S.C.C.).
28. *Montreal Newsdealer Supply Company Limited* v. *Board of Cinema Censors of the Province of Quebec and the Attorney-General for the Province of Quebec* [1969] C.S. 83.
29. [1969] C.S. 83, 90-93. See the cases of *Dufresne* v. *The King* [1912] 5 D.L.R. 501; *Saumur* v. *Quebec* (1953) 2 S.C.R. 299; *Johnson* v. *A-G for Alberta* [1954] S.C.R. 127; *Birks* v. *City of Montreal* [1955] S.C.R. 799; *Switzman* v. *Elbling* [1957] S.C.R. 285. Similar issues may arise in relation to attempts at municipal regulation of obscenity: *Hlookoff* v. *City of Vancouver* (1968) 67 D.L.R. (2d) 119 (B.C.S.C.).

DEFENCES

> ""Lascivious . . . works when beauty has touched them, cease to give out what is wilful and disquieting in their subject and become altogether intellectual and sublime. There is a high breathlessness about beauty that cancels lust."
>
> George Santayana, *The Life of Reason,* vol. 4: Reason in Art, London, 1912, 170-171.

It is sometimes proposed that even if a work is obscene, it is redeemed by its possession of certain meritorious qualities which serve the public good, by the author's sincerity of purpose or reputation, or by favorable comparison with other unprosecuted works in circulation.

1. Public Good

Section 159(3) provides

> "No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good."

Sub-section 4 declares that it is a question of law whether an act served the public good but it is a question of fact (i.e. for the jury) whether the acts did or did not extend beyond what served the public good.

The affirmative defence of public good does not apply to ss. 160, 163 or 164. At common law, the publication of an obscene libel under the *Hicklin* test could not be justified on the ground that the "public good" was served or advanced by the defendant's action. It was Sir James Stephen who first formulated this supposed defence when, in his *Digest of the Criminal Law*,[1] he submitted that:

> "A person is justified in exhibiting disgusting objects, or publishing obscene books, papers, writings, prints, pictures, drawings or other representations, if their exhibition or publication is for the public good, as being necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature or art, or other objects of general interest; but the justification ceases if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published."

In Canada, this defence was incorporated into the *Criminal Code* and, although it has a long history of changes and modifications,[2] the influence of Stephen can still be recognized.

It is not sufficient to satisfy the requirements of sub-section (3) for an accused person to establish that the public good was served by the alleged act. He must also establish that the act did not extend beyond what served the public good. But these requirements of the statutory defence raise questions of considerable difficulty. As Mr. Justice Laidlaw explained in *R.* v. *American News Company Ltd.*:

> "In what way can an accused person establish the requirements of sub-section (3)? How can he prove that the public good was served by the alleged criminal act? How can he establish that the act did not extend beyond what served the public good? It has been decided in *R.* v. *Palmer* [1937] 68 C.C.C. 20, that the provision in subsection (3) contemplated and authorized the giving of evidence by the accused to prove that the public good was served by the acts complained of. But who can say with any degree of certainty that the public good was served by an act tending to deprave and corrupt the minds of some classes of the public? For every person holding the view that the public good was served by such an act, the prosecution could no doubt adduce evidence of another or many other persons who hold the opposite view. Who is qualified to speak with any authority in answer to the question? I do not know, but I assume that the presiding Judge would decide that matter in accordance with the particular circumstances of each case. Again, what is included in the words 'public good'? Surely it does not mean benefit or advantage to the public of every conceivable kind. I suggest that the limitation on those words appearing in the submission by Mr. Justice Stephen . . . namely, that which is 'necessary' or advantageous to reli-

> gion, or morality, to the administration or justice, the pursuit of science, literature or art, or other objects of general interest. Without such limitation or description the defence is of such a vague, indefinite character as to be almost impracticable both in theory and in practice"[3]

In *R.* v. *Cameron,*[4] MacKay, J.A. noted that there was little judicial guidance on the general subject of public good but rejected as untenable an argument to the effect that, as long as there is artistic merit in a drawing or painting, the public good is served, no matter how explicitly sexual matters are portrayed. Indeed his Honour came close to articulating the position that if a work unduly exploited a theme of sex as a dominant characteristic the public good could never be served.[5] But such a position would render nugatory the affirmative defence under s.159(3) for it is tantamount to holding that whenever a publication is obscene under s.159(8) the defence of public good is excluded under s.159(3). While this position might have made sense under a dual test of obscenity [*Hicklin* and s.159(8)], it is illogical in the state of the law as presently interpreted by Canadian courts.

Not only is the meaning of public good unclear, but also the relationship between s.159(3) and the reference to "without lawful justification or excuse" in s.159(2). It is understood that the public good defence is an affirmative defence which must be established by the accused on the balance of probability, whereas s.159(2) requires the Crown to negative lawful justification or excuse and that the Crown must discharge its onus of proof beyond reasonable doubt,[6] but what precisely the heads are of lawful justification or excuse under 159(2), and what relationship they bear to the legitimate heads of public good, is completely obscure.

2. Author's Purpose

It was previously shown that the process of judicial interpretation of s.159(8) of the *Criminal Code* definition of obscenity introduced the author's purpose as a factor relevant to the determination of obscenity. The cases indicate that the innocent intentions or excellent reputation of the author should be considered in assessing whether his work is legally obscene even though he is not the actual person charged with the dissemination of the alleged obscenity. It is not clear whether this ground of exculpation is distinct from, or part of the defences of "public good" or "literary and artistic merit" but it is, in any event, essentially no more than a manoeuvre to divert attention from the conduct of the publisher and to focus it upon the moral blamelessness of the author who, indirectly, will also be condemned if the work is found obscene. Thus under s.160 the author, as well as the owner of the matter seized and alleged to be obscene, may appear in order to oppose the making of a forfeiture order. Quite apart from evidentiary problems in relation to the establishment of the author's motives or purposes (particularly in relation to deceased writers) it is difficult to see how the author's sincerity of purpose and good reputation alone can be regarded as the antitheses of obscenity.

3. Literary or Artistic Merit

In Canada, no specific defence of literary or artistic merit exists, although these factors are considered as relevant to the determination of obscenity under s.159(8). In England, the supposed defence of public good finds expression in the protection expressly afforded to works of literary, scientific or artistic merit. Thus s.4(1) of the *English Obscene Publications Act* (1959) states:

> "A person shall not be convicted of an offence against . . . this Act, and an order for forfeiture shall not be made . . . if it is proved that the publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern."

In Australia, the legislation of each state offers differing degrees of immunity to a variety of material. The protection offered ranges from the requirement that the tribunal consider any such merit merely as a factor in determining the issue of obscenity, to an acceptance of literary, scientific or artistic merit as a complete defence. In two states of Australia express reference is made to exemption from criminal liability accorded *bona fide* professional or political publications.[7] The argument for expressly recognizing defences of this nature is considered below.

4. Comparison With Other Books

Another suggested defence is that if the publication complained of is not materially different from others which circulate freely at the time of the prosecution, it ought not to be found obscene. In *R.* v. *Coles Company Limited*[8] counsel for the appellant argued that since, in *Brodie's* case the book *Lady Chatterley's Lover* was held not to be obscene, the publication then before the court (the book *Fanny Hill*) should also be ruled unob-

jectionable. The court refused to accede to the request in accordance with the principle established in the English cases that the character of other unprosecuted books is irrelevant to the determination of the obscenity or otherwise of a publication before the court.[9]

It must, however, be pointed out that comparison with other books is not totally barred since, if literary merit of the work is put in issue either under s.159(3) or 159(8), evidence relating to the nature and standards of contemporary literature would be admissible to establish whether the publication has redeeming merit.

In similar fashion the climate of literature, as evidenced by the widespread circulation of books, can be of particular relevance to the "community standards" interpretation of "undue exploitation" in the *Criminal Code* definition of obscenity. It may well be argued that whether writing offends against a community's standards of decency can be gauged by the extent to which publications similar to those charged as obscene are freely circulating and publically tolerated.[10] But this is not acceptable to the courts as an indicant of the community's standards of decency and tolerance, and therefore demonstration of the wide dissemination of similar but unprosecuted works can never, of itself, be used as a defence to an obscenity charge. Such evidence may, however, be taken into account by the judge or magistrate in imposing sentence.[11]

5. Why Special Defences?

If the legal controls on the publication of obscenity are designed to protect the community from harm, why allow such defences?[12] In the case of works of literary, artistic and scientific merit it is argued, by those who place a high value on literary skills, aesthetic quality and scientific objectivity, that these qualities carry with them a kind of disinterest or detachment which is incompatible with corruption. This is a difficult proposition to accept, for it is more reasonable to expect that literary skill would render the obscenity more palatable, more potent and thus more likely to influence readers.

When the *Roth* case was before the United States Federal Court of Appeals, Mr. Justice Frank noted the curious dilemma wherin obscenity statutes condemn the books that were dull and without merit (the ones least likely to affect readers) yet exempted works of literary distinction (books most likely to affect readers) and he commented:

> "The courts have not yet explained how they escape the dilemma, but instead seem to have gone to sleep (although rather uncomfortably) on its horns."[13]

The explanation certainly does not lie in Santayana's belief that somehow art magically effaces or nullifies obscenity. Art and law exist in different realms and even the finest artistic creation may be adjudged obscene if the court believes that it satisfies the legal criteria prescribed. And to date the criteria applied in the judicial determination of obscenity are not drawn from the world of art, science or literature; they are crude expressions of what are thought to be the moral values of the community.

The special defences do not change something which is obscene into something which is not obscene.[14] The correct analysis of the special statutory exemptions is that they enable writing of cultural or social worth to escape suppression *despite* the fact that it deviates from accepted standards of decency. This is a manifestation of a belief that art, literature and the sciences are a mark of civilization and that high value should be placed upon freedom of expression in these areas. It would appear, in Canada, where specific defences of literary, artistic or scientific merit are not available or are subject to restrictive qualifications in theory or practice, freedom of literary, artistic or scientific expression is not accepted as a value paramount to that of avoiding the harm feared from obscene publications.

It should also be added that recognition of special defences of artistic etc. merit implies recognition of a doctrine of inherent obscenity since it involves examining the allegedly obscene text in isolation. This would mean that if the content is found to possess merit, the work would not be accounted legally obscene no matter to what audience it was distributed. On this theory a medical text, having scientific merit, would neither be obscene in the hands of doctors nor in the hands of children. The doctrine of circumstantial obscenity on the other hand, is less concerned with the inherent qualities of the publication than with the use to which it is put. Thus a pornographic book in the hands of sex researchers still remains erotic, but the person who sold the book to them is entitled to be acquitted, not because the work has scientific merit, but because, in the circumstances, the work was disseminated to an audience not likely to be harmed. In this context it is relevant to note that the defence of public good under s.159(3) does not refer to whether the *book* or *publication* was for the public good but whether the public good was served by the *acts* (*i.e.* sales, distribution, etc.) that are alleged to constitute the offence. Under this formulation, literary etc. merit is relevant as only one factor in the circumstances of dissemination which determine the legal obscenity of the book, rather than a unique feature which redeems a publication which would otherwise be considered inherently obscene.

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1. (3rd ed.) London, 1883, 116.
2. For history of the "public good" sub-section in the *Criminal Code* see Laidlaw J.A. in *R.* v. *American News Co. Ltd.* (1957) 118 C.C.C. 152, 162-166 (Ont.C.A.).
3. *Ibid.*, 166.
4. [1966] 4 C.C.C. 273 (Ont.C.A.).
5. *Ibid.*, 287-288.
6. Since the Crown is being called upon to prove a negative as an element of the charge, little proof will often suffice: *R.* v. *Cameron, ibid.*, 287-288, 289-293 & 300-301.
7. Victoria: *Police Offences Act*, (1958), s.180; Queensland: *Objectionable Literature Act*, (1954), s.4(2).
8. [1965] 2 C.C.C. 304 (Ont.C.A.).
9. *Ibid.*, 313, referring to *R.* v. *Reiter* [1954] 2 Q.B. 16 and *Galletly* v. *Laird* [1953] S.C.(J.) 16.
10. See *Robson* v. *Hicks Smith & Son Ltd* [1965] N.Z.L.R. 113; *R.* v. *Cameron* (1966) 4 C.C.C. 273, 309-310.
11. *R.* v. *Close* [1948] V.L.R. 445, 453; *Kerr Hislop* v. *Walton* [1952] N.Z.L.R. 267, 271.
12. See generally Hughes, *Perspectives on Pornography*, New York, 1970; Clor, *Obscenity and Public Morality*, Chicago, 1969, ch. 7.
13. *U.S.* v. *Roth* (1957) 237 F. 2d 796, 819.
14. *R.* v. *National News Co. Ltd.* (1953) 106 C.C.C. 26.

EXPERT EVIDENCE

> " . . . the departure from [the *Hicklin* rule] has meant not only a change in the legal test of obscenity but also a change in the kind of evidence, information and materials receivable by a court in that connection . . . . It is important in this branch of the law that judges, especially when trying cases without a Jury, and Magistrates should be exposed to the persuasion of evidence and extrinsic materials to counter-balance the ineradicable subjective factor residing in the application of any legal standard of obscenity, however objective it purports to be".
>
> *R.* v. *Cameron* [1966] 4 C.C.C. 273, 302 per Laskin J. (Ont.C.A.).

Expert opinion evidence is likely to be adduced in obscenity cases in relation to the establishment of the defence of public good under s.159(3), to prove author's purpose and literary, artistic or scientific merit, and in order to demonstrate the nature of community standards. Although the *Criminal Code* does not go as far as the English legislation to expressly provide for the admissibility of expert opinion evidence on the literary, scientific, or other merits of the publication before the court[1], there is no doubt that as a matter of practice such evidence is admissible[2]. Indeed the courts' acceptance of the relevance of author's purpose and merit renders indispensible the appraisal of literary and scientific experts for, without their assistance the courts would find themselves in the role of having to assume the character of the literary expert — a role which magistrates are rarely competent to play. Since under s.159(8) of the *Code* the courts require the tribunal to test the allegedly obscene matter against the current community standards of acceptance and tolerance, the problem of deciding to ascertain the standards must be faced. The Australian courts which have had occasion to deal with this issue have taken the view that the appropriate technique of assessing community standards is simply to leave the entire issue to the tribunal of fact which is assumed to have the requisite knowledge. Thus, typically, in *Wavish's* case Martin J. declared that:

> "When the question is whether a book or article, judged by present day standards . . . offends against the standards of the community, I consider that a Magistrate or Jury is just as capable of deciding if it is likely to have that effect as are psychiatrists or psychologists."[3]

The Canadian approach to the discernment of community standards is to allow the tribunal of fact to hear expert evidence. This technique accepts that community standards are phenomena which, although diverse, may be capable of objective ascertainment and that the courts need not restrict themselves to evidence culled only from "common sense", "ordinary experience", "judicial notice", or other similar introspective approaches. Thus, in *R.* v. *Great Western News Ltd. Mantell and Mitchell,*[4] the Manitoba Court of appeal held that, in the trial of an obscenity charge, expert testimony to describe the standards of the community is admissible in evidence though it is not *sine qua non* of conviction.[5] It is relevant, in passing, to note that the compilers of the American Law Institute's *Model Penal Code* also recognized the value of expert evidence in obscenity cases in their proposal that, in any prosecution for obscenity, evidence (including expert testimony) should be admissible to show, *inter alia*, the degree of public acceptance of the material.[6] However incomplete their scientific evidence may be, the experience and findings of social scientists called upon as expert witnesses are likely to be more objective than the intuition of a judge, magistrate or jury and therefore they provide a preferable basis for the court's decision.

In three recent obscenity cases Canadian courts have been invited to receive survey evidence of community standards of tolerance of sexually explicit material. The judicial responses indicate a willingness on the part of the courts to admit properly introduced social survey data which appears relevant to the resolution of the question whether the publication offends community standards.[7] The judges are, however, not without their hesitancies and there is still some ambiguity as to the proper basis upon which survey findings can be admitted.

In each of the three cases the survey evidence was not admitted, or was treated as having no persuasive weight. In part this was because of methodological weaknesses in the research itself, but the major difficulty arises because under s.159(8), the courts seek a national standard of tolerance and not merely a provincial or local one.[8] Surveys are grounded in the logic of attempting to measure the whole by an examination of a

representative part. The difficulty of obtaining a representative unbiased sample for the purpose of establishing national community standards are substantial if not insuperable. In *Prairie Schooner News Ltd. & Powers*, Mr. Justice Freedman adverted to the problem of the survey becoming too costly and impracticable[9] and this may constitute an important factor in considering whether the search for a national standard is a realistic basis upon which to test obscenity.

Ironical though it may appear, if the legal definition of obscenity is interpreted to require scientific evidence of a very high standard, and the defence does not have the resources to commission the necessary study, the courts will revert to use of impressionistic opinion evidence. Thus in *R.* v. *Pipeline News*[10] survey evidence was adduced by the defence but rebutted by prosecution expert witnesses and ultimately excluded as a ponderable factor in the decision. The judge then having decided that the scientific evidence was inadequate to assist him decide whether the material before the court contravened national Canadian community standards, in accordance with well established principles,[11] he dutifully applied a standard based upon his own subjective experiences:

> ". . . the judge must, in the final analysis, endeavour to apply what he, in the light of his experience, regards as contemporary standards of the Canadian community."[12]

Though obscenity is a legal concept, it is wrong for the court to assume that in every case it has sufficient knowledge of the factual basis upon which the legal definition is to operate. The court must not deny itself the opportunity of being enlightened, if for no other reason than the fact that the expert's testimony may act as an antidote to an underlying, unstated, variable in the case, namely, the judge's own moral conservatism. The fact that the task of assessing the merits of the often conflicting opinion of experts will be a difficult one is no ground for refusing to hear such evidence and reverting to an intuitive method of determining the matter.

If the law of obscenity is to be modified it is essential that provision be made for permitting the receipt of such evidence and that attention be paid to the question whether the legal definitions are formulated in such a manner as to be incapable of being objectively assessed, having regard to the costs involved and the available techniques of social science.

REFERENCES

1. Eng: *Obscene Publications Act* (1959), s.4(2).
2. *R.* v. *Brodie* (1962) 132 C.C.C. 161 (S.C.C.); *R.* v. *Coles Co.* [1965] 2 C.C.C. 304 (Ont.C.A.). But note s.7 *Canada Evidence Act* R.S.C. 1970, c.E-10 provides that not more than five expert witnesses to give opinion evidence may be called by either side without leave of the court.
3. [1959] V.R. 57, 63. See generally Fox, *The Concept of Obscenity*, Melbourne, 1967, ch.8; Whyte, "Use of Expert Testimony in Obscenity Litigation", [1965] *Wisconsin Law Review* 113; Ross, "Expert Testimony in Obscenity Cases", (1966) 18 *Hastings Law Journal* 161; Stern, "Toward a Rationale for the Use of Expert Testimony in Obscenity Litigation", (1969) 20 *Case Western Reserve Law Review* 523.
4. [1970] 4 C.C.C. 307 (Man.C.A.) — Leave to Appeal Denied: Supreme Court Bulletin, February 6th, 1970.
5. But compare the dissenting judgement of Laskin in *R.* v. *Cameron* [1966] 4 C.C.C. 273, 305; "Expert evidence to assist the judge or magistrate or judge and jury is accordingly indispensible."
6. *Model Penal Code* (Proposed Official Draft), 1962, s.251.5(4)(d).
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8. See Fox, "Criminal Law — Survey Evidence of Community Standards in Obscenity Prosecutions", (1972) 50 *Canadian Bar Review* 315.
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12. *Ibid.*, 314-315.

ARGUMENTS FOR CHANGE AND LEGISLATIVE ALTERNATIVES

> "If one has to choose the most muddled law in Canada today there is no doubt that the law relating to obscenity would be a top contender."
>
> D.A. Schmeiser, *Civil Liberties in Canada*, London, 1964, 232.

The arguments over revision of the law relating to obscenity range from those which indicate a basic satisfaction with the *status quo* to those which reflect demands either for more stringent laws, or for the total abolition of legal control. Sometimes the demand is simply for increased (or decreased) efficiency in enforcement without reference to the state of the law, but, by and large, the two are interwoven and modification of the law is thought to be the panacea for all complaints.

1. Preserving The Status Quo

One end of the continuum of opinion holds that the existing law is satisfactory, both as formulated and in practice. If there are problems, they arise from discrepancies in enforcement, but these are discretionary matters for police officers and prosecutors who have to act according to the climate of opinion in their local community and the policing resources available to them.[1] The exercise of these local discretions provide a useful buffer between legislation which can only be defined in broad principles and which, because of its very subject matter, cannot provide elaborate unambiguous guidance in specific cases. According to the proponents of this view, "obscenity" describes a feature of common experience which is sufficiently familiar to warrant dispensing with the attempt at a comprehensive definition. In addition, the claim is made that even though there is uncertainty as to its range of meaning, the word is no more vague than other terms used by the courts since "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree".[2]

Moreover, there is evidence suggesting that the North American community is in fact not greatly concerned about obscenity. The 1970 interview survey of a random sample of 2,486 adults and 769 young persons in the United States conducted at the request of the Commission on Obscenity and Pornography found only 2% of the population referred to erotic materials as one of the two or three most serious problems facing their country.[3] In Canada, the wide range of sexually explicit materials openly available and the low number of prosecutions or seizures instituted by police (see Appendix C) may also be read as suggesting that there is no overwhelming concern for a modification of the *status quo*.

2. Clarification and Re-Definition of Existing Law

A variation of the *status quo* position is one which merely seeks legislative settlement of the major unresolved interpretative issues that are a product of the 1959 attempt to introduce a double test of obscenity into the *Code*. This form of "tidying up" requires no major policy changes but looks to the legislature to settle the following:

(a) Whether the *Hicklin* test of obscenity is not totally abrogated in Canada in favour of the definition in s.159(8)?

(b) If it is clearly no longer to be part of the law, what test of obscenity should apply to code offences not involving "publications"? Should not s.159(8) apply to all media forms?

(c) What is the relationship between the words "obscene", "indecent" and "immoral" as used in the *Code* and other Federal statutes dealing with obscenity and related matters? Would not a single common word such as "obscene" suffice for certainty of interpretation?

(d) What is the role and relative weight of "public good", "author's purpose", "artistic literary and scientific merit" and "community standards" in the determination of obscenity? And how are these factors to be related one to another?

(e) What intention or knowledge is required to constitute the mental element in offences involving dissemination of obscenity? Cannot these matters be dealt with as an aspect of the codification of the general part of the criminal law?

Any such operation will be based upon the premise that the climate of public opinion is not such as would permit either obscenity laws to be swept out lock, stock and barrel, or extended and expanded. The concern is for clarification and, perhaps, some amelioration through the introduction of logical and, at least, internally consistent anti-obscenity legislation.

A more substantial "tidying up" operation might include consideration of provisions which would redefine obscenity, clarify the nature of defences, require warnings prior to seizure or prosecution, and allow interested parties to obtain non-punitive declaratory judgements regarding the alleged obscenity of disputed publications. But whatever approach, short of total repeal, is taken to the role of the criminal law in the censorship of sexually explicit materials, a number of common problems will inevitably remain.

First, what is the legislative intention in enacting or maintaining such legislation? As has been demonstrated earlier in this paper, the *raison d'etre* of the law of obscenity is not clear, but appears to be an amalgam of utilitarian and moral justifications, not all of which can stand up under close examination. If the legislature takes the view that the evils obscenity legislation is designed to suppress includes sexual arousal, overt misbehaviour, change in moral standards and commercial exploitation, the law will need to be far broader in application than if the danger is thought to rest only in offence to the public and distorted sexual education of juveniles.

One possible way of solving this first difficulty would be by incorporating a statement of purpose in the anti-obscenity legislation. Statements of legislative aims, purpose or intent (a function which at one time was served by the preamble of an Act) could be used not only for the *Criminal Code* as a whole but also for sections creating specific offences (unless the point of the section is unquestionably self-evident). Under Canadian law, the courts may not look to parliamentary debates for elucidation of legislative intent, and even were they permitted to do so, they would find themselves in considerable difficulty in determining which statements made during the progress of a Bill represent the legislature's policies. A statement of legislative policy incorporated in the Act itself would obviate this problem. Though the drafting difficulties should not be underestimated, the value of such a statement is threefold: it would serve to expose for critical evaluation the hitherto unstated, and often unwarranted, assumptions upon which the legislation has been built; it would provide police and prosecutors some guidance as to the manner in which they should exercise their largely unfettered enforcement discretions; and it would provide courts with some identification of the social harm which the legislature is seeking to forestall as well as an indication, more helpful than the mere listing of sentencing maxima, of the manner in which the court should regard offenders.

The American Law Institute's *Model Penal Code* provides general statements of purpose in its introductory sections dealing with matters such as purposes, principles of construction, general principles of liability, justification, responsibility, and so forth. The United States Commission on Obscenity and Pornography introduces its proposed legislation controlling the sale and display of explicit sexual material to young persons with the following specific statement of purpose:

> "It is the purpose of this section to regulate the direct commercial distribution of certain explicit sexual materials to young persons in order to aid parents in supervising and controlling the access of children to such material. The Legislature finds that whatever social value such material may have for young persons can adequately be served by its availability to young persons through their parents"[4]

and the section prohibiting public displays opens with:

> "It is the purpose of this section to prohibit the open public display of certain explicit sexual materials, in order to protect persons from potential offence through involuntary exposure to such material."[5]

A second common problem concerns the definition of the subject matter prohibited. No single word such as obscene, indecent, or immoral (words presently used in the *Code*) or related terms such as pornographic, objectionable or offensive, can suffice to give fair warning of the subject matter objected to or of the adjudicative standards to be applied. The Legislature may choose, in a search for clarity, to enact "clear" and "simple" prohibitions which offer no greater definition of the matter prosecuted than the requirement that it be "obscene". The clarity and simplicity thus attained is illusory for, as the Canadian experience demonstrates, the door is then opened to a multitude of uneven judicial interpretations which turn out to be neither clear, simple or self-evident. The statutes sometimes opt for a recitation of multiple synonyms as a means of definition, but this is no advance and serves only to confuse. If it is intended to maintain some form of criminal law con-

trol, an attempt will have to be made to identify the prohibited material in terms more meaningful than used in the past.

Two main approaches are possible. One attempts to define the matter objected to by reference to its impact on others in bringing about the mischief the legislature is seeking to restrain, *e.g.* as in the *Hicklin* test: obscene matter is that which tends to deprave and corrupt a susceptible audience. The alternative tack is to try to define the prohibited matter by reference to its content and its internal characteristics, *e.g.* as under s.159(8): obscene material is that in which the undue exploitation of sex is a dominant characteristic. The latter type of definition appears potentially more objective, and easier to apply, but it always carries with it the unstated assumptions that all material exhibiting these characteristics is harmful to viewers and readers. The former style of definition is vague as to the internal characteristics of the publication but has the advantage of concentrating on effects. Both forms of definition need to be supported by provisions which permit evidence to be given regarding the effects of the publication in question and the law should not permit the impact to be implied or inferred as under the *Hicklin* rule in practice.

The first type of definition reflects the concept of obscenity as circumstantial in nature; the second treats obscenity as an inherent quality of certain subject matter. But both types of definition will be defective if they are couched in such generalities as to be almost totally devoid of objective meaning. The English experience with the case of *John Calder (Publications) Ltd.* v. *Powell*[6] where the words depravity and corruption were extended to non-sexual forms of corruption is a telling illustration of the ambiguities which exist. At least s.159(8) specifies that the content of obscenity must be sexual in nature. Present Canadian legislation still, however, attempts to avoid the need for a more elaborate definition by casting off responsibility to the courts through the use of generalities such as "unduly emphasizes". But the judicial interpretation of this phrase has led to more confusion and subjectivity than ever the Minister of Justice expected when he introduced it in 1959.

The Commission on Obscenity and Pornography, in attempting to cope with the definitional problem, avoided the use of the word obscene or indecent and made its prohibitions turn on what is described as "explicit sexual material". This is defined as:

> "Any pictorial or three dimensional material including, but not limited to, books, magazines, films, photographs and statuary, which is made up in whole or in dominant part of depictions of human sexual intercourse, masturbation, sodomy (i.e. bestiality, or oral or anal intercourse), direct physical stimulation of unclothed genitals, or flagellation or torture in the context of a sexual relationship, or which emphasizes the depiction of uncovered human genitals; provided however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition."[7]

The definition problem must be tackled though it will never be solved. The subject matter which constitutes obscenity, and the circumstances in which such material is regarded as being justifiably exposed, changes over time and remains as illusive as the search for community standards under s.159(8) of the *Code*. The compromise that may have to be considered in a purely clarification and redefinition exercise is a combination of a more objective definition of the subject matter thought to be inherently obscene (along the lines suggested by the Commission definition above) together with a clear legislative recognition of the circumstantial nature of the phenomenon of obscenity in the form of exemptions from liability or affirmative defences. These may be based upon the redeeming qualities of the work and upon proof of the fact that the circumstances of its dissemination indicate that the harm feared is unlikely to occur. In other words, the legislature defines the content of matter regarded as *prima facie* obscene, but acknowledges that in certain circumstances of dissemination that some material should not be legally accounted as obscene notwithstanding the social judgement that the content of the material is obnoxious. An example of legislative recognition of the circumstantial nature of obscenity is found in the final report of the National Commission on Reform of U.S. Federal Criminal Laws. The section dealing with obscene material provides:

> "It is a defence to a prosecution under this section that dissemination was restricted to: (a) institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material; or (b) non-commercial dissemination to personal associates of the actor; or (c) dissemination carried on in such a manner as, in fact, to minimize risk of exposure to children under 18 or to persons who had no effective opportunity to choose not to be so exposed."[8]

Works of literary or scientific merit, if not thought to be protected under (a) above could be incorporated in the definition of obscene matter and exempted from liability in the same way as works of art and anthropological significance are excluded under the draft legislation recommended by the Obscenity Commission.

Such provisions may need to be supplemented by a section such as s.251.4 of the *Model Penal Code* which expressly provides that evidence shall be admissible to show, *inter alia*

> "(a) the character of the audience for which the material was designed or to which it was directed;
> (b) what the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on conduct of such people:
> (c) artistic, literary, scientific, educational or other merits of the material;
> (d) the degree of public acceptance of the material. . . . "

It may also be necessary, having regard to the general objections voiced against the law of conspiracy, and the particular manner in which it can be used to by-pass safeguards built into the substantive law of obscenity, either to prohibit prosecutions for conspiring to disseminate obscene matter, or to enact legislation ensuring that the defences available to disseminators of obscenity may be equally available to those who agree with each other to distribute such material.

Consideration may also be given to the introduction of a legislative requirement of warnings before prosecution in the case of commercial distributors. At the moment, although the police may exercise a discretion to warn booksellers and others of their intention to prosecute, there is no legal obligation on them to do so.[9] Written warnings before prosecution may be advantageous both to the Crown and the accused. They would aid the Crown in establishing *mens rea* if the material was sold despite the warning, but they would also permit the seller to take steps to withdraw from the sale or otherwise limit the dissemination of the material objected to without a prosecution being instituted.

Since the only manner in which the warning could be challenged would be by continuing to sell or distribute the alleged obscenity and thus invite criminal prosecution with its attendant risks, the arbitrariness of a police warning or prosecution system might be limited by the introduction of a means whereby the question of the obscenity of a publication could be resolved by some form of declaratory judgement which carried no immediate threat of punishment. In 1963, New Zealand created a special *Indecent Publications Tribunal*[10] whose sole function is to determine whether any book, magazine or periodical (either in manuscript or final form) or any sound recording referred to it is indecent.[11] The Tribunal has, however, no power to punish disseminators of offensive works. The legislation provides that whenever the question of the indecency of a publication or recording arises in any civil or criminal proceedings, the court hearing the matter must refer the question to the Indecent Publications Tribunal for decision and report since the Tribunal is granted exclusive jurisdiction to determine the issue of indecency in such cases. Furthermore, the Comptroller of Customs, the Secretary of Justice or, by special leave, any other person may submit a publication or record to the Tribunal for decision without any civil or criminal proceedings having been instigated. And once it has been delivered, the decision of the Tribunal as to the character of the work becomes conclusive evidence in any subsequent judicial proceedings other than an appeal to the Supreme Court. The legislation takes into account the circumstantial nature of obscenity and indecency by providing that the Tribunal may declare that the work is indecent only in the hands of persons under a specified age or that it is indecent unless restricted to specified persons or classes of persons, or unless it is used for a particular purpose. Similarly, changing community standards are taken into account by a provision that permits reclassification of a work after three years. A similar system of declaratory judgements is in operation in Massachusetts through the civil courts[12] and such an approach has been mooted for Canada in recent years[13] though, if introduced, it would have to be defined as falling within the criminal law head of constitutional power.

The seizure provisions under s.160 are designed to prevent certain matter being disseminated at all. If such *in rem* proceedings are to be continued in revised legislation it must be pursuant to a clear legislative desire to prevent commercial distribution of sexual material irrespective of the audience to whom it is to be made available. If profit-making is not the harm feared and obscenity is recognized as being circumstantial in nature, it would be logical to amend s.160 to enable the respondent to show that the audience to whom the material was or was likely to be disseminated was not the class of person which the law was attempting to protect.

Insofar as unevenness of enforcement is concerned, a possible means of curbing the prosecutorial zeal of individual police officers might be to require the consent of the Attorney-General before proceedings are brought as is presently necessary under s.170 of the *Code* (offence of public nudity). Finally, in clarifying existing law, consideration should be given to the abrogation of s.159(1)(b) and (7) (prohibitions on crime comics) and the references to seizure of crime comics in s.160. As a distinct category of offensive material "crime comics" is so all-encompassing as to be practically meaningless. Attention must be paid to articulating the legislative policy behind such prohibitions and, if the harm feared is the learning of criminal techniques, it will become relevant to ask why other media forms, especially television, are not also included within the

wording of the prohibition. If portrayal of excessive violence itself is objected to it may be clearer to identify this as a distinct category outside the definition of obscenity[14] rather than continue with the combination of sex and crime, horror, cruelty and violence which now make up s.159(8). Again, however, the questions must be put: On what basis and for what purpose are these prohibitions included? Are there groups or classes of persons in whose hands this matter is not objectionable? Are there circumstances in which such material can be disseminated without social danger? If so the law should, logically, permit exceptions from liability and specify them in terms more precise than "lawful justification or excuse" or "public good" which define the present exculpations in the *Code*. Similar questions must also be answered in respect of s.159(2)(b), (c) and (d). It may be more appropriate to treat s.159(2)(b) (public exhibition of disgusting object or indecent show) under an extension of common nuisance (s.176) and s.159(2)(c) and (b) (advertising and sale of abortifacients and treatments for impotence and V.D.) may, if required as continuing prohibitions against false advertising or advertising illegal drugs, be relegated either to provincial false advertising or V.D. control legislation, or incorporated in Federal drug regulations.

As far as other Federal legislation is concerned, if prohibitions on obscenity are to continue, a common descriptive term for the prohibited material is required together with reference to the *Code* definition of that same term. The *Customs Tariff Act* schedule refers to indecent and immoral publications, yet in the first and only reported Tariff Board Appeal on the meaning of these words they were treated as calling forth the *Hicklin* test of obscenity and two of the three members of the Board added an addendum to their judgement calling for an amendment to the tariff item so that it only applied to books which were obscene under the *Criminal Code*. Since the Customs seizure powers are similar to those exercised under s.160 of the *Code*, the same arguments regarding revision to allow for consideration of the potential audience are applicable.

3. Extended Prohibitions

A third position is one which calls for more extensive involvement by the criminal law in the control of the dissemination of offensive material. This position is based on the premises that obscenity and pornography are breeding grounds of crime and that official permissiveness is a sign of moral weakness sufficient to jeopardize the very fabric of society. It is said that the state's interest in protecting the level of morality in the community, "protects this level from falling and creates an atmosphere by which it can rise" and that:

> "The obvious morals protected are chastity, modesty, temperance, and self-sacrificing love. The obvious evils being inhibited are lust, adultery, incest, homosexuality, bestiality, masturbation and fornication."[16]

On this view, existing law has been unable to effectively moderate the flow of pornography and demeaning sexual behaviour and further control on pornography and sexual behaviour is required for social stability and cultural enrichment. There is no other choice but the extension of censorship controls.[17] The extended censorship position also calls in aid concern for the debasing effect pornography has upon the sense of human dignity,[18] and the need to protect the young. The possibility that even privately possessed obscenity might reach children is adduced as a justification for widening the anti-obscenity laws to cover even private consensual possession and, at the same time, there is a demand for the extension of obscenity laws to cover material depicting extreme violence.[19] The most vocal of those who seek extended censorship reject the research reports, findings, and recommendations of the Commission on Obscenity and Pornography as biased, inaccurate and incomplete.[20] In addition they contend that it is impossible, and totally unnecessary to attempt to prove or disprove a cause and effect relationship between pornography and criminal behaviour.[21] They claim that there are certain social phenomena whose existence can be confidently asserted without being sanctioned by empirical research or statistical evidence and that some actions may therefore be legitimately punished by society despite the absence of scientific proof that they tend to cause harm. It is enough, the argument runs, that the action is generally felt to be harmful.[22]

The legislative techniques for implementing a more rigid policy of anti-obscenity control includes redefinition of obscenity to cover other forms of offensive content, extended prohibitions on private and commercial dissemination, limitation on type and number of defences, reversal of burden of proof from Crown to the accused, abandonment of the requirement of guilty intent or knowledge, increased restrictions on importation and mailing, and the setting up of censorship tribunals or other forms of prior restraint.

4. Total or Partial Repeal

A fourth possible response is to withdraw the criminal law's involvement in the regulation of obscenity. Again a number of variations in the implementation of such an approach are possible. These may range from total repeal of existing legislation with the intent of permitting absolute freedom of dissemination, through to

legislation which permits all private consensual transactions between adults but which prohibits other transactions in which there is an element of publicity, the requirement of consent is absent, or in which juveniles are involved.

This decriminalization position is based on a number of premises of which the foremost is that freedom of expression is one of the primary social and political values which should be as little interfered with as possible. Although the underpinning of the demand for freedom of expression is a belief that through open and free exchange of ideas the community will be "advanced" or "improved", the demonstration of the likelihood of such advancement is not conceded to be the *sine qua non* of free expression. The claim, at its widest, is that individuals have a right to possess, read and view whatever they choose, regardless of the apparent lack of objective social value of the material. And since the right to read or view cannot be exercised without access to some source of distribution (unless the material involved is self produced) it follows logically that at least some dissemination must be permitted. Thus the claim to freedom of expression, carries with it, as a corollary, a demand to the right to receive and retain the product of the exercise of free expression by others. The degree of risk the legislature should be prepared to take in the interest of maximizing other communal values such as freedom of speech is more a matter of policy, than of empirical research. However, it is worth adding that the national opinion survey conducted by the Commission on Obscenity and Pornography indicated that a majority of adults (almost 60%) believed that adults should be allowed to read or see any explicit sexual material they wanted.[23] There has been no equivalent Canadian study.

The argument for total or partial repeal is also based on a denial that any demonstrated harm flows from exposure to obscene matter and, insofar as such material may carry with it the potential to change moral standards, resisting change is not the proper function of the criminal law. As the Wolfenden Report puts it:

> " . . . the function of the criminal law . . . is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others . . . there must remain a realm of private morality and immorality which is . . . not the law's business."[24]

Moreover, it is argued that legislative intervention will likely continue to do more harm than good, not only because of the inherent crudity, harshness and arbitrariness of the criminal law process, but also because the obscenity law itself suffers from excessive subjectivity and ambiguity. The law is incapable of reflecting community standards in a pluralistic society and, in effect, attempts instead to compel the judges' personal standards upon others under the guise of dealing with social evils. But these evils themselves are purely speculative. Positive educative approaches to the development of healthy attitudes towards sexuality provide a more rational way of dealing with the "problem" of pornography than the negative approach of the criminal law.[25]

In 1969 in Great Britain, the Arts Council Working Party, after an extensive inquiry, called for the repeal of the English *Obscene Publications Acts* of 1959 and 1964 for a trial period of five years. The reasons given this recommendation were as follows:

> " (1) It is not for the State to prohibit private citizens from choosing what they may or may not enjoy in literature or art unless there were incontrovertible evidence that the result would be injurious to society. There is no such evidence.
>
> (2) No crystal ball can tell us dogmatically whether more or less pornography would result from Repeal but in any case there is a complete absence of evidence to suggest that sex in the arts, even when aphrodisiac in intention, has criminal or anti-social repercussions.
>
> (3) Though it is sometimes conjectured with no indisputable evidence that heavy and prolonged exposure to the portrayal of violence may not only reflect but also influence the standards of society, violence has been ubiquitous in the art, literature and Press of the civilised world for so long that censorship must by now be recognised as a totally inadequate weapon to combat it. Indeed laws available for the purpose including the Obscenity Acts are virtually never seen invoked against it.
>
> (4) Since judges have to work in what is in effect a legal vacuum, the prosecution of an occasional book — usually the wrong one — often succeds only in bringing the law into disrepute, without effectively preventing the distribution even of that book.
>
> (5) The very objective of the law is not even established, let alone identified in concrete meaningful terms that could command acceptance. Although judges emphasise that an article cannot be condemned because it shocks or disgusts, in practice that is precisely what happens, since juries have no other criterion to guide them.
>
> (6) It is impossible to devise a definition of obscenity that does not beg the question or a rational procedure for weighing depravity and corruption against artistic merit and the 'public good'.

(7) When juries and defendants are without a comprehensible definition of the crime alleged, the defendant is left at the mercy of a personal opinion; which is a system of censorship rather than a system of law.
(8) It is intolerable that a man should be criminally punished for an action that he has no means of ascertaining in advance is criminal.
(9) Incitement to criminal behaviour is sufficiently covered by the ordinary law of incitement. To that extent the Obscenity Acts are redundant. Insofar as they add the concept of a mere unintentional tendency toward crime as a punishable offence they are to be deplored.
(10) It is an affront both to legal and common sense that incitement to a non-crime should be punishable as a crime; and worse when this doctrine is extended to a mere tendency.
(11) No encouragement should be given to the concept of the State as *custos morum* with its corollary that merely to shock is a criminal offence.
(12) The proper sanction for breaches of taste or non-conformity with current *mores* should be social reprobation and not penal legislation."[26]

The Working Party concluded that the anti-obscenity laws constituted a danger to the innocent private individual and provided no serious benefit to the public. The problems in founding an acceptable law on a concept as subjective as obscenity were insuperable and there was little hope that alternative legislation would offer more than peripheral improvements.

In September 1970, after two years of study, the United States Commission on Obscenity and Pornography reported to the President and the Congress that it recommended that federal, state and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed.[27] The Commission stated that it believed that there was no warrant for continued governmental interference with the full freedom of adults to obtain, read, or view any sexual material they wished. This conclusion was based upon the following factors:[28]

(1) Empirical research has found no evidence to date to indicate that exposure to explicit sexual materials plays a significant role in delinquent or criminal behaviour in youth or adults.
(2) Explicit sexual materials are sought out as a source of entertainment and information by substantial numbers of adults.
(3) Present anti-obscenity laws have not been successful in operation because of vagueness and inconsistent application.
(4) Public opinion does not support the imposition of legal restrictions on the right of adults to read or see sexual material.
(5) Consistent enforcement of consensual adult transactions in obscene material would require the expenditure of considerable law enforcement resources.
(6) Obscenity laws prohibiting dissemination of materials to adults are a threat to the traditions of free speech, free press and free communication of ideas.
(7) The desire to shield juveniles from obscene material does not justify prohibiting adults from obtaining access to this material. To do so would be to adjust the level of adult communication down to that considered suitable for children.
(8) There is no evidence to indicate that elimination on control of sexual materials available to adults would adversely affect the availability to the public of other books, magazines and films.
(9) There is no evidence that the lawful distribution of sexually explicit materials to adults will adversely affect private or public morality in such a way as to induce anti-social or criminal behaviour.
(10) It is unwise for government to attempt to legislate individual moral values and standards independent of behaviour, especially when such legislation involves restrictions on consensual communications and where there is no clear public mandate to do so.

But neither the Arts Council Working Party nor the Obscenity Commission advocated total absence of legal controls. Both reports recommended maintenance of legislation aimed at protection of juveniles from exposure to obscene matter and at abating the public nuisance aspect of obscenity which was highly visible in public places or thrust upon unwilling recipients. Even Denmark, which has long been thought of as a country in which obscenity laws have been totally repealed, retains vestigial prohibitions on selling obscenity to persons under 16 years of age[29] and upon the imposition of obscene material on people who do not wish to see it.[30] Furthermore, police by-laws exist which are intended to prevent distribution and exhibition of offensive publications or pictures in public places, the word "offensive" being regarded as more comprehensive than obscene. The Danish legislation, and the English and American recommendations each seek to punish the mailing of obscene matter to individuals who have not solicited it. Mailing, at the request of the recipient, would not be prohibited and the censorship role of the Post Office would, to that extent, be diminished.

As has been previously pointed out in this paper, the justification for legislation aimed specifically at withholding obscenity from juveniles is not to be found in scientifically established facts as to the effect of obscenity on juveniles. It rests upon the view that protection of youngsters from risk of distorted sexual learning, moral danger and the potentiality of delinquency (even though the risk is extremely remote) is a value of greater significance than unregulated freedom of expression and that, provided adults are not restricted in their access to this material, the interference with freedom of expression is in any event not substantial. One other justification, which has been advanced in all seriousness, is that if the state does not provide reasonable protection to children, parents and others will take private concerted action against obscenity. The excesses demonstrated by some of the United States citizen action groups in imposing their standards of propriety on others, leads to the proposition that legislation with respect to children is a necessary alternative to "vigilante action."[31] Whether this holds true for Canada is, perhaps, doubtful.

Related both to the juvenile protection and public offense justifications for retaining a minimal level of obscenity law is the suggestion that obscene material be required to bear an "adults only" label or sticker to give fair warning of the offensiveness of its contents. Apart from the passing observation that juveniles may be thus more tempted to try to obtain material so labelled, practical difficulties may arise in requiring such labels. Even assuming that a retailer knows and is capable of accurately applying the law to the materials he handles, it would be unfair to expect him to be familiar with the contents of more than a small proportion of the books and periodicals in stock. To prove his knowledge of the contents would be difficult but, equally, to make the offence of disseminating obscenity to juveniles or unwilling adults one of strict liability is objected to on the grounds that it may result in the conviction of innocent persons. If labelling is thought necessary it would be more appropriate to require the manufacturer or importer of the publication to affix a label indicating that, *prima facie*, it falls within the range of material defined as obscene. This would, of course, require a fairly elaborate descriptive definition of obscenity, such as the one discussed earlier in this section of the paper. *Hicklin* or s.159(8) definitions would be unworkable on account of their vagueness. Both the manufacturer and the importer can, more reasonably, be expected to know the nature of the publication's contents.

The object of the public offence prohibitions is the protection of persons from unwilling confrontations with offensive representations. Freedom of expression is not substantially thwarted, because what cannot be publicly displayed can still be privately distributed to willing adults. Anti-display statutes may even serve a useful function in removing irritants from public view and thus calming the advocates of greater censorship. Legislation of this type, when combined with the legalization of private consensual transactions would drive obscenity into *discreet* rather than underground channels[32] since distributors who can sell legally to adults are less likely to sell illegally to children or thrust material on an unwilling public.

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3. *Commission on Obscenity and Pornography*, New York, 1970, 187-188.
4. *Commission on Obscenity and Pornography*, 76.
5. *Ibid.*, 78.
6. [1965] 2 W.L.R. 138.
7. *Commission on Obscenity and Pornography*, 77.
8. National Commission on Reform of Federal Criminal Laws, *Final Report*, Washington, 1971, 267 (s.1851).
9. Such legislation exists in Australia — W.A.: *Indecent Publications Act* 1902, s.6; *Vagrants, Gaming and other Offences Act* 1931-67, s.14.
10. N.Z.: *Indecent Publications Act* 1963. For a detailed exposition of the history and work of the Tribunal see Perry, *The Indecent Publications Tribunal*, Christchurch, 1965 and McKean, "The War Against Indecent Publications", (1965) 1 *Otago Law Review* 75. The Tribunal consists of a Chairman who must be a barrister or solicitor of at least seven years' standing and four other members of whom at least two must have special qualifications in the field of literature or education.
11. The operative term in the New Zealand legislation is "indecent". The word "obscene" is not used but "indecent" covers the same ground since s.2 declares that "indecent" includes "describing, depicting, expressing, or otherwise dealing with matters of sex, horror, crime, cruelty or violence in a manner that is injurious to the public good".
12. Zellick, "New Approach to the Control of Obscenity", (1970) 33 *Modern Law Review* 289.
13. Krotter, "The Censorship of Obscenity in British Columbia: Opinion and Practice", (1970) 5 *University of British Columbia Law Review* 123. See also Mohr, *Report on a Study of Obscene and Indecent Literature*, Toronto, 1958, 69-70 for a suggested "non-coercive" system of preventive justice in relation to obscene publications.

14. Clor, *Obscenity and Public Morality*, Chicago, 1969, 245 offers the following as an element which might be *included* in a legal definition of obscenity: "An obscene book [etc.] is one which tends predominantly to: . . .

> "Visually portray in detail, or graphically describe in lurid detail, the violent physical destruction, torture, or dismemberment of a human being provided that this is done to exploit morbid or shameful interest in these matters and not for genuine scientific, educational, or artistic purposes."

15. *Appeal No. 471, re Peyton Place,* (1958) 92 (1) *Canada Gazette* 1438.
16. Hill, Link & Keating Minority Report, *Commission on Obscenity and Pornography* 500.
17. Bonniwell, "The Social Control of Pornography and Sexual Behaviour", (1971) 397 *The Annals* 97.
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23. *Commission on Obscenity and Pornography*, 411. There is no equivalent Canadian study.
24. *Report on the Committee on Homosexual Offenses and Prostitution,* H.M.S.O., 1957, 9-10 & 24.
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27. *Commission on Obscenity and Pornography*, 57.
28. *Ibid.*, 58-62. See also recommendations of the San Francisco Committee on Crime, *Report on Non-Victim Crime in San Francisco: Part II — Sexual Conduct, Gambling and Pornography*, 1971, 56-82.
29. Danish *Criminal Code* s.234. See generally Schindler, *A Report on Denmark's Legalized Pornography*, Torrance California, 1969.
30. Danish *Criminal Code* s.232.
31. Dibble, "Obscenity: A State Quarantine to Protect Children", (1966) 39 *Southern California Law Review* 345.
32. San Francisco Committee on Crime, *Report on Non-Victim Crime in San Francisco: Part II — Sexual Conduct, Gambling and Pornography*, 1971, 77-82.

CONCLUDING REMARKS

> "By this time Gertrude Stein was in a sad state of indecision and worry. I sat next to her and she said to me early in the afternoon, What is the answer? I was silent. In that case, she said, what is the question?"
>
> Alice B. Toklas, *What is Remembered,*
> New York, 1963, 173.

Controversy and conflict are inevitable concomitants of the law of obscenity. No matter what recommendations are made by the Law Reform Commission, they will not be received with unanimous approval either by the legislature or the Canadian public at large. No community is ever unanimous as to what is required by way of legal controls on sexual materials. There are very few fixed principles; value judgements are always at the core of the matter. And in a complex society, divergent values are forced to compete for legal recognition. Advocates on either side of the controversy will employ rhetoric and invoke authority to assert contradictory value systems. The debate will take the form of rival vested interests (churches, police, helping professions, publishers and sellers) stating their case on the effect or lack of effect of certain forms of media on a "vital", but ill defined and selectively perceived, communal value. The Commission will be pressed to acknowledge, in its legislative recommendations on obscenity, the moral supremacy of the values of one sector of the public over those of another. That the final recommendations will be read in this fashion is unquestionable. But that the criminal law on obscenity should be framed with this as an objective is unacceptable. In a pluralistic community, such as Canada, the criminal law should not be modified simply in order to give effect to, or reinforce the moral standards of a powerful or vocal minority, or even of a majority. Independent criteria of harmfulness such as those suggested by the Canadian Committee on Corrections, must provide the measure of justification *viz*:

> "1. No act should be criminally proscribed unless its incidence, actual or potential, is *substantially damaging to society.*
> 2. No act should be criminally prohibited where its incidence may adequately be controlled by social forces other than the criminal process. Public opinion may be enough to curtail certain kinds of behaviour. Other kinds of behaviour may be more appropriately dealt with by non-criminal legal processes, e.g. by legislation relating to mental health or social and economic condition.
> 3. No law should give rise to social or personal damage greater than that it was designed to prevent."[1]

And although it smacks of *ad hominem* argument, the Commission may have to take into account, in assessing responses to proposed recommendations, some of the recent research findings regarding the presence of a hard core minority of adults who are opposed on principle to the existence of explicit materials and who indicate that their opposition will remain even if the material is shown to have no harmful effects and is limited to private reading and viewing by adults.[2]

In the 1960's the obscenity debate was focussed on the extent to which the community was willing to hobble literature and the arts, but the case is no longer being put on the grounds of access to works of merit. The proliferation of sexually explicit pictorial matter, most of which can lay no claim to artistic or scientific merit, has compelled the proponents of less restrictive laws to ground their argument upon the contention that the material is not harmful. It is difficult to prove a negative and, understandably, the interpretations of the research findings aimed at estimating the impact of obscenity have been questioned vigorously. The Commission on Obscenity's research on effects is not conclusive in any absolute sense though the direction in which it points does require serious consideration. However, as one critic has pointed out:

> "It will be unfortunate if people conclude that the obscenity problem has now been resolved because now, at last, we have the scientific facts. It would be even more unfortunate if people accept the implicit claims that the Commission has made for the primacy of its behaviouralist methodology over other ways of thinking about social problems and legal principles."[3]

It may well be that recommendations for liberalization of the law can rest simply on a policy decision to withdraw the criminal law from all areas of conduct except those that threaten substantial harm. In the field of private morals this would allow minorities the freedom to remain pluralistic instead of coercing them to conformity.

If, on the other hand, extended anti-obscenity legislation and a vigorous campaign of law enforcement is to be recommended, attention should at least be given to whether the community is willing to pay the costs in manpower, money and invasions of privacy. The question of monetary costs and manpower might be easily tested by recommending that each new offence created should be accompanied by an allocation of funds for its enforcement.

Ultimately the problem to be resolved in whether, in Canada in the 1970's, the state through the vehicle of the criminal law must maintain its role as *custos morum* over consenting adults. Are there to be any circumstances in which one willing adult will legally be permitted to purchase, from another, access to any sexual material he or she desires?

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APPENDIX A

(See text pp. 74-75)

CANADA POST OFFICE DEPARTMENT POLICIES

The Director of Security and Investigation Services of the Canada Post Office has stated (personal communication May 1972) that the Post Office Department does not assume the role of censor. Before exercising his power to issue prohibitory orders with s.7 of the *Post Office Act,* the Postmaster General requires evidence more than a mere complaint. It must consist of actual items or documents which clearly prove the use of the mails for the transmission, delivery or receipt of such items by an identifiable person or organization. Before recommending the issuance of a prohibitory order by the Postmaster General, the Security and Investigation staff consult with the Department of Justice to seek information that the evidence placed before the Minister covers all the essential elements of the offence under enquiry.

The interim prohibitory order is subject to appeal under the terms of the *Post Office Act* to a Board of Review. In order to obtain an impartial Board, the Department has made use of the Services of members of the Restrictive Trade Practices Commission or persons suggested by them.

The Department points out that s.7 does not impose any obligation on the Postmaster-General to initiate criminal proceedings against persons found to have been using the mails to commit offences and there have, in fact, been no prosecutions conducted by the Post Office Department under s.164 of the *Criminal Code.*

Since 1964, sixty-one prohibitory orders have been issued under s.7 of the *Post Office Act.* Forty-six of these arose out of cases involving obscenity, two arose out of obscenity and fraud offences, and the remaining thirteen related to fraud. Six orders have been revoked by the Postmaster-General following requests from the affected persons accompanied by undertakings not to further offend. Fifty-five prohibitory orders currently remain in effect.

APPENDIX B

(See Text pp. 75-76)

* CANADIAN CUSTOMS POLICIES

Canadian customs policies regarding the administration of Tariff Item 99201-1 are based upon:

(a) The section of the *Criminal Code* which deals with obscene matters, i.e. Section 159(8) and on its interpretation by the courts; and
(b) The sense of community standards reflected in decisions arising under the *Customs Act* in which immorality or indecent matters are concerned.

In order to implement the above policy, instructions or guidelines are provided Customs Port Officers. The current instructions delegate to the field level the authority to prohibit hard-core pornography, i.e. pictorial material that lewdly and explicitly emphasizes or displays the genitals, intercourse and perversions; reading material containing explicit hard-core fictional text dedicated entirely to sexual exploitation and containing no redeeming features. Less explicit but similar material concentrating mainly on sexual activities; and material thinly disguised as serving a literary, artistic, scientific or medical standpoint, will be referred to Ottawa for resolution. Pin-up type magazines and magazines that are regarded as *bona fide* advocating nudism are not treated as *prima facie* prohibited.

* Although it reflects the author's views this appendix has been modified by The Project.

APPENDIX C

(See text p. 97)

OBSCENITY CHARGES AND SEIZURES IN CANADA

Statistics Canada neither collects nor publishes figures on the number of obscenity charges, prosecutions or seizures in Canada. The information is available only by direct communication with each individual Federal, provincial and municipal police department or division. The following is a tabulation of the replies received to a request for information addressed to the police forces of each of the provincial capitals and larger cities and all RCMP divisions. Because of variations between forces in classifying, recording and tabulating charges neither the completeness nor comparability of the figures presented can be taken for granted.

OBSCENITY CHARGES OR SEIZURES DURING LAST TWO YEARS

City or District	s.159 Offences of Making, Selling, etc	s.160 Warrants of Seizure	s.161 Offence of Tied Sale	s.163 Immoral Theatrical Performance	s.164 Mailing Obscene Matter
BRITISH COLUMBIA					
Vancouver	1970 — 12 1971 — 138	—	—	— 1971 — 7	1970 — 1 —
Victoria					
City Police	1970, 1971 — 1	—	—	1970, 1971 — 1	—
RCMP E DIV C.I.B.	1971 — 5	1971 — 2	—	—	—
ALBERTA					
Edmonton					
City Police	1971 — 14 1972 — 6 (to April)	1971 — 9 1972 — 4 (to April)	—	— 1972 — 7 (to April)	— —
RCMP K Div C.I.B.	1971 — 1	—	—	—	—
SASKATCHEWAN					
Saskatoon					
City Police	Year Ending April 1972 — 6	Year Ending April 1972 — 7	—	Year Ending April 1972 — 2	—
Regina					
City Police	1970 — 2 1971 — 3	— — 1972 — 5 (to April)	— — —	— 1971 — 1 —	— — —
RCMP F Div C.I.B.	1971, 1972 — 1	1971, 1972 — 2	—	—	—
MANITOBA					
Winnipeg	1970 — 7 1971 — 14 1971 — 4 (to April)	— — —	— — —	— — —	— 1971 — 3 —
ONTARIO					
London	1970 — 5 1971 — 12 1972 — 9 (to March)	— — —	— — —	— 1971 — 31 —	— — —
Ottawa	1971 — 248	1971 — 248	—	1971 — 8	—
Sault Ste-Marie	1972 — 1 (to April)	—	—	—	—
Sudbury	1971 — 2	—	—	—	—
Thunderbay	1971 — 1	—	—	—	—
Toronto	1970 — 126 1971 — 46	Not Available	—	1970 — 2 1971 — 4	1970 — 6 1971 — 2

City or District	s.159 Offences of Making, Selling, etc	s.160 Warrants of Seizure	s.161 Offence of Fied Sale	s.163 Immoral Theatrical Performance	s.164 Mailing Obscene Matter
QUEBEC					
Montreal					
City Police	1971 } 222 1972 } (to April)	1971 } 1 1972 } (to April)			Not Available
Quebec Police	1970 14 1971 58	1971 13		1970 7 1971 3	1970 2 1971 2
Quebec					
City Police	1972 15 (to May)	1972 15 (to May			
Quebec Police	1970 8 1971 2	1970 2 1971 4	1971 1	1970 5 1971 5	1971 1
District Bas St-Laurent					
Quebec Police	1971 } 4 1972 } (to May)	1971 } 6 1972 }		5	
District de L' Estrie					
Quebec Police	1971 } 4 1972 } (to May)	1971 } 4 1972 } (to May)		6	
NEW BRUNSWICK					
Fredericton					
City Police	No prosecutions or seizures in last two years				
RCMP J Div C.I.B.	No prosecutions or seizures in last two years				
PRINCE EDWARD ISLAND					
Charlottetown					
City Police					
RCMP L Div C.I.B.	No prosecutions or seizures in last two years				
NOVA SCOTIA					
Halifax					
RCMP H Div C.I.B.	Statistics Not Available				
NEWFOUNDLAND & LABRADOR					
St. Johns					
City Police	1971 } 2 1972 }				
RCMP D Div C.I.B.	1971 2	Not Available		1971 2	
NORTHWEST TERRITORIES & YUKON					
RCMP G Div C.I.B.	1970 1	1970 1